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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

BEN GARRISON, as Personal Representative of the Estates of Ralph and Molly Garrison,
Petitioner,

v.

JOSEPH POLISAR, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IF THE ANALYSES FOR QUALIFIED IMMUNITY AND EXCESSIVE FORCE MERGE, AS FIVE CIRCUITS HAVE FOUND, BUT AS SIX CIRCUITS HAVE REJECTED, SHOULD THE COURT OR THE JURY RESOLVE THIS MERGED INQUIRY?

II. IS THE COURT OF APPEALS PERMITTED TO DEFER TO THE TRIAL COURT'S DETERMINATION OF STATE LAW UNDER SALVE REGINA COLLEGE V. RUSSELL, 499 U.S. 225 (1991)?

PARTIES TO THE PROCEEDING

Petitioner is Ben Garrison as the Personal Representative of the Estates of Ralph Garrison, deceased, and Molly Garrison, deceased. Petitioner is an individual and has no corporate affiliations.

Respondents are Joseph Polisar, Ruben Davalos, J. R. DeBuck, Judd Schaffer, Kevin McCabe, Steve Rodriguez, Howard Neal Terry, Charles Lopez, Christina Baca, Mary Patrick, Mary Marquez, and Gilbert Duran ("City Respondents"), in their individual and official capacities; and, Joseph Bowdich, Kenneth Bozell, David Linthicum, Larry Stebleton, Erik Little, James Monteith, James Gonzales, Patrick Lucero, Fermin Ortega, Greg Reese, David Archibeque, and Van Eldredge ("County Respondents"), in their individual and official capacities.

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OPINIONS BELOW

The Order and Judgment of the Tenth Circuit Court of Appeals, entered August 11, 2000, is not published in the Federal Reporter, but is published at 2000 WL 1140256. The Order and Judgment is set forth in Appendix A at 1a. The Tenth Circuit also entered an Order requiring Respondents to respond to Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* on August 29, 2000. This unpublished Order is set forth in Appendix B at 10a. The Tenth Circuit also entered an Order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* on October 12, 2000. This unpublished Order is set forth in Appendix F at 67a.

The trial court entered three Orders granting summary judgment on Petitioner's claims, on March 31, 1998, March 12, 1999, and May 12, 1999. These unpublished Orders are set forth in Appendix E at 61a, Appendix D at 15a, and Appendix C at 12a, respectively.

JURISDICTION

The Order and Judgment of the Tenth Circuit Court of Appeals in this case was entered on August 11, 2000. (App. A at 1a.) The appellate court's denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* was entered on October 12, 2000. (App. F at 67a.) The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106. Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c), this Petition is timely if filed within ninety (90) days of the denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * * * * * * * *

U.S. Const. amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * * * * * * * * * *

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * * * * * * * * *

STATEMENT OF THE CASE

In this civil action, Petitioner Ben Garrison sued Respondents, law enforcement officers employed by the City of Albuquerque and the County of Bernalillo, alleging that Respondents violated the Fourth Amendment when they shot and killed Petitioner's father, seized and evicted his mother, and searched his parents' home in the course of executing a search warrant at the house next door. Petitioner also alleged numerous violations of state tort law based on these actions. Jurisdiction in the United States District Court for the District of New Mexico was based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, and 1367.

The United States District Court for the District of New Mexico entered three (3) Orders addressing Respondents' many motions to dismiss and for summary judgment. On March 31, 1998, the trial court granted the City Respondents summary judgment on Petitioner's supervisory liability claims. (App. E at 61a.) On March 12, 1999, the trial court granted the City Respondents summary judgment on all of Petitioner's remaining claims, and granted the County Respondents summary judgment on Petitioner's claims under 42 U.S.C. § 1983. (App. D at 15a.) Finally, on May 12, 1999, the trial court granted the County Respondents summary judgment on Petitioner's state law claims, and dismissed the case. (App. C at 12a.) Petitioner timely appealed to the United States Court of Appeals for the Tenth Circuit, and the appellate court affirmed the trial court's rulings by Order and Judgment filed August 11, 2000. (App. A at 1a.) Petitioner filed a Petition for Rehearing and Suggestion of Rehearing *En Banc*, (App. G at 70a), and although the appellate court required Respondents to answer this Petition, the court nevertheless denied the Petition on October 12, 2000. (App. F at 67a.)

The disputed facts of the case, viewed in the light most favorable to Petitioner, are as follows.[1] In the dark of the early, winter morning of December 16, 1996, Respondents executed a search warrant at 2615 Quincy, in Albuquerque, New Mexico. The warrant authorized a search of the premises and of certain named individuals suspected of counterfeiting documents. Ralph and Molly Garrison owned 2615 Quincy and resided next door. They rented 2615 Quincy to tenants. Neither the Garrisons nor their residence were subjects of the warrant. The Garrisons were visibly elderly and infirm.

On the morning of December 16, the Garrisons were awakened by what they believed to be an attack by thugs at their rental property. Respondents, officers of the Albuquerque Police Department and the Bernalillo County Sheriff's Department, were using flash/bang devices, ramming tools, and 12-gauge shotgun "shok lock" rounds to enter 2615 Quincy, as a helicopter roared overhead. The clamor caused Mr. Garrison to fear for the safety of himself, his wife, his property, and his tenants. He went out his back door to investigate. Respondents shined lights in his face, and several officers simultaneously shouted "police" and "sheriff," and commanded him to return inside. He visibly

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[1] Throughout Petitioner's appeal, Respondents have protested that Petitioner's factual allegations are unsupported and "slanted." However, Petitioner has consistently cited to those portions of the record supporting his allegations, (see, e.g., App. G at 78a-81a), and Petitioner is entitled to have the record viewed in the light most favorable to him. See, e.g., McNair v. Coffey, — F.3d —, No. 00-1139, 2000 WL 1801253, at *1 (7th Cir. Dec. 8, 2000) (Easterbrook, J.). Respondents can of course raise any genuine, material factual disputes as a defense, but should do so to a jury, not to the trial and appellate courts.

could not understand what Respondents were saying, and remained outside until Respondent Little became "mad" and shouted at him to go back inside. Respondent Little acknowledged that Mr. Garrison appeared to be responding to the sound of the officers' voices without understanding.

Respondents Little, Monteith, and Terry knew that Mr. Garrison did not realize they were officers, and thought he might return outside armed. Indeed, Respondent Little specifically said to Respondents Monteith and Terry, "watch this guy come out with a gun now." Nevertheless, these Respondents neither took advantage of copious available cover, nor warned other officers to do so. Further, they made no attempt to have an available officer approach Mr. Garrison in an audible and intelligible manner, *e.g.*, by knocking on his front door or using a public address system, to explain to him that they were police officers.

Meanwhile, Mr. Garrison called "911." Respondent Duran took Mr. Garrison's call. Mr. Garrison gave his address, and said he thought armed robbers were breaking into his rental property next door. Respondent Duran knew that the people breaking in were officers. He also knew that Mr. Garrison did *not* know. However, Respondent Duran did not tell Mr. Garrison this critical fact, even after Mr. Garrison told Respondent Duran that he was going back outside with a gun to shoot the 'robbers.' Instead, Respondent Duran told Mr. Garrison to take the telephone with him, too. Respondent Duran made no attempt to alert his fellow officers regarding the situation.

From ninety (90) seconds to several minutes after his first encounter with Respondents, Mr. Garrison returned to his back door, with his gun in one hand and his telephone in the other. He raised the gun, although he could see only

"partial shapes." Respondents Terry, Little, and Monteith, shouting "drop the gun," shot Mr. Garrison, inflicting the wounds of which he would soon die.

The County Respondents entered the Garrison residence, and found Mr. Garrison lying in the doorway. Even though Mr. Garrison was under the constant surveillance of several officers, lying on his back gurgling but not moving, missing a large part of his wrist, and several feet away from any weapon, Respondents handcuffed him. Respondents then searched the Garrison home, including a medicine cabinet and bedroom drawers. Respondents also followed Mrs. Garrison around her home, watched her use the toilet, and refused to tell her what had happened to her husband. Respondents later had Petitioner remove Mrs. Garrison from her home to ease their investigation of the shooting. Mrs. Garrison never saw her husband alive again.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE ANALYSES FOR QUALIFIED IMMUNITY AND EXCESSIVE FORCE MERGE, AS FIVE CIRCUITS HAVE FOUND, BUT AS SIX CIRCUITS HAVE REJECTED, AND THE JURY SHOULD RESOLVE THIS MERGED INQUIRY.

Petitioner alleged that Respondents used excessive force in shooting and killing Mr. Garrison, in violation of the Fourth Amendment to the United States Constitution. Petitioner's appeal of the summary judgment against him on these claims raised an important federal question about the scope of qualified immunity in excessive force cases. Specifically, Petitioner contended that the analyses for qualified immunity and excessive force merge, as five circuits

have found but as six have rejected, and that the jury should generally resolve this merged inquiry. See McNair v. Coffey, — F.3d —, No. 00-1139, 2000 1801253, at *2 (7th Cir. Dec. 8, 2000) (Easterbrook, J.) (collecting cases in favor of and against merger of inquiry). This Court has already granted certiorari twice in connection with this significant question. See Katz v. United States, 194 F.3d 962 (9th Cir. 1999), cert. granted sub nom. Saucier v. Katz, — U.S. —, 121 S. Ct. 480 (Nov. 13, 2000); Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998), cert. granted, 525 U.S. 1098 (1999), cert. dismissed, 526 U.S. 1083 (1999).

Ordinarily, qualified immunity is "a powerful defense." Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991), superseded on other grounds by Graham v. Connor, 490 U.S. 386 (1989). However, the defense of qualified immunity should be of limited significance in excessive force cases, because police use of excessive force necessarily violates a clearly established constitutional right.

> Uncertainty about the legal standard [governing Fourth Amendment excessive force claims] ended . . . with the Supreme Court's opinion in Graham . . . . Graham makes the norm as clear as the judiciary can achieve, more specific than rules of tort law under which juries regularly award large damages against surgeons and auto manufacturers.

McNair, 2000 WL 1801253, at *2. Further,

> [b]oth the second prong of the qualified immunity defense (whether a reasonable officer could have believed his conduct was lawful), and the merits of an excessive force

> claim focus on the objective reasonableness of the officer's conduct. . . . Because of this parity, . . . the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.

Katz, 194 F.3d at 968; Robinson v. Solano County, 218 F.3d 1030, 1037, rehearing en banc granted, 229 F.3d 931 (9th Cir. 2000); Quezada, 944 F.2d at 718; see also McNair, 2000 WL 1801253, at *2 (Trial court erred in setting aside jury verdict in plaintiffs' favor based on qualified immunity because "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful."); Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991) (Trial court erred in instructing jury separately on excessive force and qualified immunity because "the determination of liability and the availability of qualified immunity depend on the same findings."); but see Snyder, 142 F.3d at 800 ("There is no inherent conflict between a finding of excessive force and a finding of qualified immunity."). Thus, there should be only one, "merged" inquiry regarding excessive force, *i.e.*, whether the force used was objectively reasonable under all of the surrounding circumstances. The Court has apparently granted certiorari on this question in the Katz case, as it previously did in the Snyder case.[2]

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[2] The Court does not appear to have decided this issue. See, e.g., Graham, 490 U.S. at 399 n.12 ("[T]he officer's objective good faith - that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment - may be

Should the Court hold that the qualified immunity and excessive force inquiries merge, this holding will inevitably and immediately raise the question centrally at issue in this case. Specifically, once the merged inquiry is recognized, whether the judge or the jury should resolve the merged inquiry must also be addressed. The Tenth Circuit in this matter departed from the Seventh Circuit in McNair and the Ninth Circuit in Katz in answering this question. Compare McNair, 2000 WL 1801253, at *2-*3 (jury should decide objective reasonableness in factually close cases), and Katz, 194 F.3d at 970 n. 5 ("The question of the reasonableness of force is usually a question of fact for the jury. However, on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to the plaintiff, the evidence compels the conclusion that the officer's use of force was reasonable."), with Appendix A at 7a ("We agree that [Respondents] were acting objectively reasonable [sic] in light of surrounding facts and circumstances.").

The divergence of the Seventh, Ninth, and Tenth Circuits stems from the distinct lines of authority governing qualified immunity and excessive force claims. Generally, entitlement to qualified immunity is a legal question for the court to decide. Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991); see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (allowing interlocutory appeal of "the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law"). However, whether force is "excessive" or "objectively reasonable" is almost always a

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relevant to the availability of the qualified immunity defense . . . . [H]owever, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment.").

fact issue for the jury to decide. Katz, 194 F.3d at 970 n.5; Quezada, 944 F.2d at 715. These two lines of authority come into conflict when the qualified immunity and excessive force analyses merge.[3]

The objective reasonableness of a particular use of force is an exceptionally fact-intensive inquiry that "requires careful attention to the facts and circumstances of each particular case." Graham, 490 U.S. at 396. As such, this inquiry is more appropriately left to the jury. Otherwise, defendants as well as plaintiffs would be exposed to more frequent judgments as a matter of law, because the court should remove from the jury not only those cases in which it believes that the force used *was* objectively reasonable, but also those cases in which it believes that the force was *not*. Such a trend is inappropriate to an inquiry so dependent on the myriad, often subtle details of context.

Of course, this Court could rule that, on a motion for qualified immunity, the trial court must *only* decide either (i) that an officer's actions were reasonable, or (ii) that a reasonable juror could find that the officer's actions were unreasonable. This appears to be the current practice in many Circuits, where courts commonly grant summary judgment in defendants' favor on motions for qualified immunity in excessive force cases, but virtually never grant summary

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[3] Respondents have argued that Federal Rule of Civil Procedure 56 resolves this issue, because under Rule 56, the court decides questions of law, and the jury decides questions of fact. As discussed in this section, however, whether an officer's use of force was objectively reasonable can be characterized either as a question of law, regarding qualified immunity, or as a question of fact, regarding substantive liability. Thus, Rule 56 does not resolve this issue.

judgment in plaintiffs' favor on such motions. However, courts engaging in this practice employ a quintessential double standard, treating the very same question as one of law for the court if finding for the officer, but as one of fact for the jury if finding for the plaintiff. The effect of this practice is to retain the defendant officer's right to a jury trial, but to deprive the plaintiff of that constitutional right. U.S. Const. amend. VII.

Judge Easterbrook, writing for the United States Court of Appeals for the Seventh Circuit, regarded this problem from a slightly different perspective, and observed,

> [t]o say that a public official is not exposed to damages even when all legal issues were authoritatively resolved before the conduct occurred would be to make a substantial change in the scope of liability under 42 U.S.C. § 1983. [The] argument for immunity in factually (as opposed to legally) close cases is fundamentally a request to increase the plaintiff's burden of proof–to insist that the plaintiff show a violation not by a preponderance of the evidence (where the plaintiff can win a close case) but by clear and convincing evidence (where all close cases go to the defendant), perhaps even proof beyond a reasonable doubt.

McNair, 2000 WL 1801253, at *3 (citations omitted). However, the preponderance standard of proof "applies to civil claims of all sorts . . . [and s]hould not be changed covertly, through an immunity defense that imposes a heightened standard of proof." Id.

Also, Judge Easterbrook admonished,

> [l]et us never forget that immunity in § 1983 cases is a judicial invention. Congress provided for liability in absolute terms. . . . The Supreme Court has justified immunity doctrines as approximating of the scope of public-official liability that prevailed when § 1983 was enacted. Fair enough in many parts of the law, but not when dealing with the [F]ourth [A]mendment. Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of. . . . All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability.

Id. (citations omitted). Thus, in the Fourth Amendment context, "a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical." Id. at *4. In short, practically, textually, and historically, the jury and not the judge should determine whether an officer's use of force is objectively unreasonable within the meaning of the Fourth Amendment.

If the qualified immunity and excessive force analyses merge, who should determine the ultimate inquiry of whether the defendant officer acted reasonably is an important question of federal law on which the appellate courts have divided, and which demands a clear, reasoned, and definitive resolution by this Court. See S. Ct. R. 10(a), (c); McNair, 2000 WL

1801253, at *2-*4; Robinson, 218 F.3d at 1037; Katz, 194 F.3d at 962; Snyder, 142 F.3d at 791; (App. A at 7a). This question would affect the course of almost every excessive force case. Specifically, in virtually all excessive force cases, the defendant officer raises the defense of qualified immunity. If he does so, and if the qualified immunity and excessive force analyses merge, then the trial judge will be forced to determine whether to decide for him or herself if the officer's actions were unreasonable, or rather, to leave the ultimate determination to the jury. Trial courts presently have only oblique guidance on this significant recurring issue. The Court should resolve the question conclusively, and hold that trial courts are simply to determine whether there is sufficient evidence of objective unreasonableness to go to a jury.

The Court should grant Petitioner's Petition for Writ of Certiorari, and reverse the Tenth Circuit's affirmance of summary judgment in Respondents' favor on Petitioner's excessive force claims on this basis. The Tenth Circuit offered no reasoning on this issue in its Order and Judgment. (See generally App. A at 7a-8a.) It did, however, decide the issue against Petitioner. Specifically, the Tenth Circuit restricted neither its own nor the trial court's review of Petitioner's excessive force claims to bare legal sufficiency under Federal Rule of Civil Procedure 56. (Id.) Rather, the appellate court improperly affirmed the trial court's decision on the ultimate inquiry, *i.e.*, whether the force used was in fact objectively unreasonable. (See generally App. A at 6a-9a.) In so doing, the appellate court necessarily rejected Petitioner's argument that the jury, rather than the court, should have decided this inquiry.

Had the appellate court properly restricted the scope of its own and the trial court's review, Petitioner's excessive force claims must have been allowed to proceed. The Tenth

Circuit's excessive force cases, derived from the principles of Graham v. Connor, 490 U.S. 386 (1989), clearly permit a finding of objective unreasonableness where a law enforcement officer recklessly generates the need to use deadly force against a citizen. See, e.g., Allen v. City of Muskogee, 119 F.3d 837 (10th Cir. 1997), cert. denied, 522 U.S. 1148 (1998) (there were genuine issues for trial on plaintiff's claims that officers used excessive force by recklessly precipitating incident where decedent aimed gun at officers, and officers shot decedent); Myers v. Oklahoma County Board of County Commissioners, 80 F.3d 421, 424-25 (10th Cir. 1996) (same); Sevier v. City of Lawrence, 60 F.3d 695, 700-01 (10th Cir. 1995) (trial court properly denied officers qualified immunity where officers approached decedent knowing he was armed and distraught, decedent lunged at an officer with knife, and officers shot and killed him). Likewise, in the present matter, a reasonable factfinder could have concluded that Respondents recklessly precipitated their fatal encounter with Mr. Garrison, and that their shooting of Mr. Garrison was therefore objectively unreasonable.

In the course of Petitioner's appeal, Respondents posited several objections to Petitioner's qualified immunity argument. For example, Respondents claimed that, if Petitioner is correct, qualified immunity would never be available as a defense. However, this dire prediction is plainly false. Under Federal Rule of Civil Procedure 56, the court must always inquire whether, construing the facts and inferences in the plaintiff's favor, a reasonable factfinder could find for the plaintiff. Fed. R. Civ. P. 56; McNair, 2000 WL 1801253, at *3; Katz, 194 F.3d at 970 n.5. Thus, whenever a reasonable factfinder could only conclude that an officer's use of force was objectively reasonable, the officer would be entitled to summary judgment, both substantively

and on the basis of qualified immunity. McNair, 2000 WL 1801253, at *3 (officer entitled to qualified immunity if court determines that "circumstances would not have alerted a reasonable officer that his acts *could* be deemed an application of excessive force") (emphasis added). Petitioner does not argue that either defense is eliminated. Rather, Petitioner simply observes that, in excessive force cases, the inquiries for liability and for qualified immunity are the same, and, unless there are no genuine issues of material fact, should be decided by the jury. Cf. Johnson v. Jones, 515 U.S. 304, 318 (1995) (public official may be forced to go to trial rather than pursue interlocutory appeal where trial court denied qualified immunity based on genuine issues of material fact).

Respondents also claimed that this Court rejected Petitioner's argument in Anderson v. Creighton, 484 U.S. 635 (1987). Respondents are mistaken, if only because Anderson involved a warrantless search, and not excessive force. Id. at 637. In fact, the Anderson reasoning indirectly supports Petitioner's argument. In Anderson, the plaintiffs argued that qualified immunity is inapplicable in *all* Fourth Amendment cases because the Fourth Amendment prohibits "unreasonable" searches and seizures, and qualified immunity does not protect "unreasonable" conduct. Id. at 643-44. In rejecting this argument, the Anderson Court observed that "unreasonable" in the text of the Fourth Amendment is not a legal standard, but a term of art, simply signifying "unlawful" or "undue." Id. This is in marked distinction to excessive force cases specifically, in which the actual legal standard is one of "objective unreasonableness"– the very same standard as for qualified immunity.[4] For all of these reasons, the trial

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[4] The Fifth Circuit's analysis in Snyder is similarly mistaken. In Snyder, the Fifth Circuit reasoned that a jury could

court's decision that Respondents were entitled to qualified immunity for their use of force against Mr. Garrison should have been left to the jury, and the appellate court erred in affirming the trial court's usurpation of this decision. This Court should grant this Petition, remand this matter, and restrict the Tenth Circuit's and the trial court's review of Petitioner's excessive force claims to legal sufficiency only, leaving the ultimate, merged inquiry of objective reasonableness to the jury.

II. THE COURT OF APPEALS MAY NOT DEFER TO THE TRIAL COURT'S DETERMINATION OF STATE LAW UNDER SALVE REGINA COLLEGE V. RUSSELL, 499 U.S. 225 (1991).

The federal courts have "a virtually unflagging obligation to exercise the jurisdiction given them." Newland v. First Nat'l Bank in Goodland, 82 F.3d 338, 341 n.2 (10th Cir. 1996) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).) Thus, an appellate court must consider questions placed before it, provided they are properly preserved and raised on appeal.

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find that an officer used excessive force, but was entitled to qualified immunity, because a jury could find that the force used was *actually* excessive, but did not *appear* to be excessive from a reasonable officer's perspective. 142 F.3d at 800. In fact, however, the standard for both qualified immunity and excessive force is whether the force appeared to be objectively reasonable from the officer's perspective at the time. Wilson v. Layne, 526 U.S. 603, 614 (1999) (qualified immunity); Graham, 490 U.S. at 396 (excessive force). Thus, notwithstanding the Snyder court's conclusion to the contrary, the standards for qualified immunity and excessive force are the same.

Cf., e.g., Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999) (appellate court not obliged to review issue not preserved below). This includes an obligation to conduct a plenary review of questions involving state law. Salve Regina College v. Russell, 499 U.S. 225, 231-40 (1991). In Salve Regina College, this Court overruled the then-prevailing view of the federal appellate courts, holding that these courts should not defer to the lower courts' interpretation of "local" state law, but should review state law questions *de novo*. Id.; Leavitt v. Jane L., 518 U.S. 137, 145 (1996).

In the present matter, Petitioner raised on appeal several properly preserved, substantial arguments that the Tenth Circuit simply refused to review. For example, Petitioner argued that Respondents used excessive force in handcuffing Mr. Garrison. Courts have determined that "no reasonable officer could believe that the abusive application of handcuffs was constitutional." Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); Martin v. Heideman, 106 F.3d 1308, 1311-12 (6th Cir. 1997). In the present matter, Petitioner observed that Respondents' handcuffing of Mr. Garrison was both futile and cruel. Mr. Garrison, whose wrist had just been shot half away, was peculiarly unable to reach or manipulate a weapon, and obviously vulnerable to severe pain from pressure applied to his wrist. The Tenth Circuit, however, did not even acknowledge this claim.

The Tenth Circuit also ignored Petitioner's substantial claims against Respondent Duran, the 911 operator. Respondent Duran consciously withheld from Mr. Garrison the vital information that the persons Mr. Garrison believed to be armed robbers were in fact police officers. He withheld this information even when Mr. Garrison stated he was going to go back outside with a gun to shoot the 'robbers.' Respondent Duran's behavior was quintessentially reckless,

i.e., involving the conscious disregard of a known risk of Mr. Garrison's or a police officer's death. See, e.g., Uhlrig v. Harder, 64 F.3d 567, 573 n.8 (10th Cir. 1995). These profoundly disturbing acts and omissions formed the basis of Petitioner's section 1983 and state tort claims against Respondent Duran. Nevertheless, the Tenth Circuit did not even mention these claims, much less justify the trial court's summary dismissal of them.

Most egregiously, the Tenth Circuit explicitly refused to review the trial court's dismissal of Petitioner's state tort claims, with the bare statement,

> [a]s to Garrison's state claims, we are disinclined to disturb the district court's understanding of local New Mexico law or his [sic] application thereof to the present facts.

(App. A at 9a.) In other words, the appellate court deferred to the trial court's purported expertise in "local New Mexico law." (Id.) However, this Court unequivocally prohibited such deference in Salve Regina College.[5] 499 U.S. at 231-40.

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[5] Further, the appellate court had no need to defer to the trial court's interpretation of state law. To the extent that the appellate court found the state law questions novel or difficult, the court was able to certify these questions to the state's highest court for resolution. See N.M. R. App. P. 12-607(A) (providing for certification of questions to New Mexico Supreme Court). In fact, Petitioner actually moved to certify to the New Mexico Supreme Court the question whether Respondent Duran was acting as a law enforcement officer within the meaning of the New Mexico Tort Claims Act, both in the trial court and in the court of appeals. Neither court chose to avail itself of the certification procedure, although it "in the long run save[s] time, energy, and resources and

Because the Tenth Circuit blatantly violated this Court's clear mandate in deferring to the trial court's interpretation of state law, the Court should grant this Petition, or, in the alternative, vacate the Tenth Circuit's decision in light of Salve Regina College, and remand Petitioner's state law claims to the Tenth Circuit for *de novo* review.

The City Respondents may argue that the Tenth Circuit did not defer to the trial court's interpretation of state law, but rather adopted the interpretation as its own, relying on the observation in Salve Regina College that, "[i]f the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." 499 U.S. at 233. However, in the present matter, the Tenth Circuit did not approve and adopt as its own the trial court's reasoning, which in any event was not "exhaustive" as to the many state law issues. (See App. A at 9a; App. D at 50a-58a.) Rather, the Tenth Circuit deferred to "the *district court's understanding* of local New Mexico law." (App. A at 9a (emphasis added).) This deference is precisely what Salve Regina College has forbidden, and it is no less important for this Court to hold the Tenth Circuit to the Salve Regina College decision because the Tenth Circuit phrased its rejection of the decision briefly and none too clearly.

In short, the Tenth Circuit breached its duty to review several properly preserved issues of great significance in its apparent rush to reject Petitioner's appeal at all costs, in direct contravention of this Court's precedent. See S. Ct. R. 10(c). The Court should therefore either grant Petitioner's Petition

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helps build a cooperative judicial federalism." Salve Regina College, 499 U.S. at 237 n.4.

for Writ of Certiorari or vacate the Tenth Circuit's decision in light of Salve Regina College, and remand this case to the Tenth Circuit, requiring that court to decide all questions properly before it.

CONCLUSION

For the reasons stated above, Petitioner Ben Garrison, as Personal Representative of the Estates of Ralph and Molly Garrison, requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 11, 2000]

No. 99-2193
(D.C. No. CIV-96-1801-LH/DJS)
(District of New Mexico)

BEN GARRISON, as personal representative of the Estates of Ralph Garrison deceased and Molly Garrison, for Molly Garrison individually, *Plaintiff-Appellant,*	)
v.	)
JOE POLISAR, Albuquerque Police Chief, JOE BOWDICH, Bernalillo County Sheriff, in their official and individual capacities; HOWARD NEAL TERRY, ERIK LITTLE, JAMES MONTEITH, Sheriff's Officers, in their individual capacities; LT. RUBEN DAVALOS, LT. J. R. DEBUCK, LT. JUDD SCHAFFER, SGT. KEVIN McCABE, Albuquerque Police Supervisors;	)

STEVE RODRIGUEZ, Acting Sgt.;)
CHARLES LOPEZ, Albuquerque)
Police Officer; CHRISTINA BACA,)
MARY PATRICK, MARY MARQUEZ,)
GILBERT DURAN, Albuquerque)
Police Dispatchers/Operators;)
SGT. KENNETH BOZELL,)
LT. LINTHICUM, CAPTAIN)
STEBLETON, Bernalillo County)
Sheriff's Supervisors; JAMES)
GONZALES, PATRICK LUCERO,)
FERMIN ORTEGA, GREG)
REESE, DAVID ARCHIBEQUE,)
DEPUTY VAN ELDREDGE,)
Bernalillo County Sheriff's Officers,)
Defendants-Appellees.)
)

ORDER AND JUDGMENT*

Before **TACHA**, Circuit **Judge, McWILLIAMS**, Senior Circuit Judge, and **MAGILL****, Senior Circuit Judge.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

On October 3, 1997, Molly Garrison, individually and as the personal representative of the estate of her deceased husband, Ralph Garrison, filed a second amended complaint in the United States District Court for the District of New Mexico alleging a violation of civil rights under 42 U.S.C. § 1983, asserting several state tort claims and naming as defendants 12 members of the Albuquerque Police Department and 12 members of the Bernalillo County Sheriff's office. (The City of Albuquerque and Bernalillo County were not named defendants in the second amended complaint.[1]) The basis for the action was the shooting and killing of Molly Garrison's husband, Ralph Garrison, during a search of premises in Albuquerque which were located next door to the residence where Molly and Ralph Garrison resided. In her amended complaint Molly Garrison set forth seven claims for relief: (1) unreasonable search in violation of the Fourth and Fourteenth Amendments; (2) unreasonable seizure in violation of the Fourth and Fourteenth Amendments; (3) supervisory and official capacity liability for violation of constitutional rights; (4) conspiring to violate civil rights under 42 U.S.C. § 1983; (5) wrongful death caused by law enforcement officers' assault and battery; (6) false imprisonment by law enforcement officers; and (7) negligence of law enforcement officers causing enumerated torts.[2] After

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[1] The original complaint is not a part of the record on appeal. Nonetheless, it would appear that the City of Albuquerque and Bernalillo County were named as defendants, along with individual officers of each, in the original complaint.

[2] During the course of the proceedings in the district court Molly Garrison died, and the Garrisons' son, Ben Garrison, was substituted as the personal representative of both Ralph and Molly

discovery, all defendants filed motions for summary judgment. By unpublished orders, the district court on March 31, 1998, granted some of those motions and thereafter on March 12, 1999, granted additional motions for summary judgment. Finally, on May 12, 1999, the district court granted all pending motions for summary judgment and entered an order dismissing all of Garrison's claims as to all 24 defendants. Garrison appeals. We affirm.

Some limited background facts become necessary. On December 16, 1996, pursuant to a search warrant, there was a joint search at about 6:00 a.m. of the premises at 2615 Quincy, Northeast in Albuquerque, New Mexico, carried out by the Albuquerque Police Department and the Bernalillo County Sheriff's Office. Molly and Ralph Garrison resided next door at 2619 Quincy and owned the 2615 premises, which they had rented to another. During the course of the search, Ralph Garrison, age 69, exited his back door and confronted certain of the officers who were conducting the search. The officers were in SWAT uniforms and told Garrison who they were and what they were doing. Garrison was ordered to go back into his house which he did, apparently rather reluctantly. Inside, Garrison called 911 and told the operator his story. The 911 conversation was tape recorded and is a part of the record on appeal. The conversation ended when Garrison said he was going out to "shoot the sons-of-bitches." Garrison then began exiting his back door, this time with a weapon in his hand, and there was a second confrontation between Ralph Garrison and certain of the defendants wherein certain of the defendants shot Garrison

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Garrison's estates.

as he was aiming his weapon at fellow officers. After the shooting, Ralph Garrison fell back into his home, and certain of the defendants followed him into the house, handcuffed him and made a search of the premises in which they allegedly "seized" Molly Garrison. An ambulance took Ralph Garrison to a hospital and he died shortly thereafter. Molly Garrison was not in good health and Ben Garrison was called by one of the defendants and he came and took charge of his mother.

As indicated, the district court by three separate orders granted the defendants' motions for summary judgment and entered judgment in favor of all defendants on all claims. The orders of the district court were in considerable detail. In sum, the district court held that on the record before it Officer Terry of the Albuquerque Police Department had not used excessive force in shooting Ralph Garrison and that his actions, under the described circumstances were "objectively reasonable" and that there was no violation of any constitutional right; that the ensuing search of the Garrison residence was a legitimate "protective sweep;" and that any "detention" of Molly Garrison culminating in placing her in the care of her son was proper under "the Fourth Amendment's caretaking function." For similar reasons, the district court concluded that the state claims asserted in the complaint were without merit.

On appeal, counsel's main argument is that the district court usurped the function of a jury, and that all of the various issues should have been submitted to a jury and not decided on summary judgment. In thus arguing, counsel necessarily relies on the depositional testimony of the various

defendants, since Ralph Garrison was dead and could not give his version of events.

As concerns Garrison's § 1983 claim, the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 395-7 (1989) spoke as follows:

> Today we make explicit what was implicit in *Garner's* [*Tennessee v. Garner*, 471 U.S. 1 (1985)] analysis, and hold that *all* claims that the law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.
>
> * * * * *
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

In line with *Graham*, in *Allen v. Muskogee, Okl.*, 119 F.3d 837, 840 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998), we spoke as follows:

> We analyze a § 1983 claim of excessive force by determining whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances.
>
> * * * * *
>
> The excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force. Of course, the use of force must be judged from the perspective of a reasonable officer "on the scene," who is "often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." However, as we stated in *Sevier*: "[t]he reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." We will thus consider an officer's conduct prior to the suspect's threat of force if the conduct is "immediately connected" to the suspect's threat of force (citations omitted).

We agree that Officer Terry and the two other officers who fired at Ralph Garrison when he was aiming his weapon at other officers were acting "objectively reasonable in the light of surrounding facts and circumstances." Counsel argues

that under *Allen*, which cited with approval *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995), the defendants' "own reckless or deliberate conduct during the seizure unreasonably created the need to use such force."[3] We see no "reckless or deliberate" conduct by any of the defendants which in any way created "the need to use such force." In this regard, counsel stresses the fact that when Ralph Garrison returned to his residence after his first confrontation with the officers, one of the officers remarked that he hoped Garrison would not return with a gun. Counsel suggests that such utterance somehow proves that the officers' conduct somehow precipitated the second confrontation wherein the shooting occurred. We fail to see the connection. The central fact is that when the fatal shots were fired, Ralph Garrison was aiming his gun at other officers at the scene. Considering the circumstances, we agree that Officer Terry was acting "objectively reasonable." He did not have to wait for Garrison to fire the first shot.

After being shot, the officers followed Ralph Garrison into the house where they made a "protective sweep" for their own safety. *Maryland v. Buie*, 494 U.S. 325 (1990); *United States v. Soria*, 959 F.2d 855 (10th Cir.), *cert. denied*, 506 U.S. 882 (1992). Such, in our view, was also "objectively reasonable." Nor do we perceive any unlawful "detention" of Molly Garrison. She was obviously infirm, and the officers, in a sense, took care of her until they turned her over to her son. Certainly there was no "excessive force" by any of the

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[3] In *Sevier*, footnote 7, we said that "negligent actions precipitating a confrontation would not, of course, be actionable under § 1983."

officers. *See United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993), where we, citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), observed that police officers are expected to exercise "community caretaking functions" which are independent of any criminal investigation.

As to Garrison's state claims, we are disinclined to disturb the district court's understanding of local New Mexico law or his application thereof to the present facts.

Judgment affirmed.

Entered for the court,

Robert H. McWilliams
Senior Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 29, 2000]

No. 99-2193

BEN GARRISON, as personal representative of the Estates of Ralph Garrison deceased and Molly Garrison, for Molly Garrison individually, *Plaintiff-Appellant,*	)
v.	)
JOE POLISAR, Albuquerque Police Chief, JOE BOWDICH, Bernalillo County Sheriff, in their official and individual capacities; HOWARD NEAL TERRY, ERIK LITTLE, JAMES MONTEITH, Sheriff's Officers, in their individual capacities; LT. RUBEN DAVALOS, LT. J. R. DEBUCK, LT. JUDD SCHAFFER, SGT. KEVIN McCABE, Albuquerque Police Supervisors; STEVE RODRIGUEZ, Acting Sgt.; CHARLES LOPEZ, Albuquerque Police Officer; CHRISTINA BACA,	)

MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, Albuquerque Police Dispatchers/Operators; SGT. KENNETH BOZELL, LT. LINTHICUM, CAPTAIN STEBLETON, Bernalillo County Sheriff's Supervisors; JAMES GONZALES, PATRICK LUCERO, FERMIN ORTEGA, GREG REESE, DAVID ARCHIBEQUE, DEPUTY VAN ELDREDGE, Bernalillo County Sheriff's Officers,

Defendants-Appellees.

ORDER

Before **TACHA**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **MAGILL***, Senior Circuit Judge.

This matter is before the court on appellant's petition for rehearing en banc. Appellees shall file a response to the petition on or before September 13, 2000.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

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* Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eight Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed May 12, 1999]

No. CIV 96-1801 LH/DJS

BEN GARRISON, individually and as the personal representative of the ESTATES OF RALPH GARRISON and MOLLY GARRISON, deceased,
Plaintiff,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON,

DEPUTY ERIK LITTLE, DEPUTY JAMES MONTEITH, DEPUTY JAMES GONZALES, DEPUTY PATRICK LUCERO, DEPUTY FERMIN ORTEGA, DEPUTY GREG REESE, DEPUTY DAVID ARCHIBEQUE, and DEPUTY VAN ELDREDGE in their individual and official capacities,

Defendants.

ORDER

THIS MATTER comes before the Court on the County Defendants' Motion to Dismiss State Law Claims Against the County Defendants Contained in Counts V, VI, and VII of the Second Amended Complaint (Docket No. 143), filed May 7, 1999. The Court, having considered the Motion, the accompanying memoranda, the record in this matter, and the applicable law, and otherwise being fully advised, finds that the Motion is well taken and will be granted.

County Defendants move for dismissal of "the only claims remaining [in this suit,] the state law claims against the County defendants-that is, the false imprisonment claim against the non-supervisory County defendants. . . and the assault and battery claim asserted only against County defendants Monteith and Little." (Mem. Supp. Mot. Dismiss State Law Claims at 1-2.) In his Response, Plaintiff "incorporates the arguments he has made in opposition to dismissal of all of his claims against the City Defendants, and his constitutional claims against the County Defendants [, and] does not waive any of these arguments [or] his right to appeal

th[e] Court's rulings regarding his claims against the City and County Defendants." (Pl.'s Resp. County Defs.' Mot. Dismiss State Law Claims at 1.) Plaintiff, however, "concedes that the Court's earlier rulings on his constitutional claims against all Defendants, and his state law claims against the City Defendants, also compel the dismissal of his state law claims against the County Defendants, should the Court decline to revisit these rulings." *(Id.* at 1-2.)

There is no motion before the Court to reconsider its prior rulings in this matter and the Court declines to do so *sua sponte*. Additionally, as Plaintiff concedes all of his remaining claims, this case will be dismissed.

IT IS HEREBY ORDERED that the County Defendants' Motion to Dismiss State Law Claims Against the County Defendants Contained in Counts V, VI, and VII of the Second Amended Complaint (Docket No. 143), filed May 7, 1999, is **GRANTED**.

IT IS FURTHER ORDERED that this case is **DISMISSED**.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed March 12, 1999]

No. CIV 96-1801 LH/DJS

BEN GARRISON, individually and as the personal representative of the ESTATES OF RALPH GARRISON and MOLLY GARRISON, deceased,
Plaintiff,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON,

DEPUTY ERIK LITTLE, DEPUTY)
JAMES MONTEITH, DEPUTY JAMES)
GONZALES, DEPUTY PATRICK)
LUCERO, DEPUTY FERMIN ORTEGA,)
DEPUTY GREG REESE, DEPUTY)
DAVID ARCHIBEQUE, and DEPUTY)
VAN ELDREDGE in their individual and)
official capacities,)
Defendants.)
)

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (City's Motion No. III) (Docket No. 30), filed July 17, 1997; Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (County's Motion) (Docket No. 69), filed October 24, 1997; City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (City's Motion No. VI) (Docket No. 74), filed November 5, 1997; City Defendants' Motion for Partial Summary Judgment No. VII: Qualified Immunity for Defendant Officers Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (City's Motion No. VII) (Docket No. 85), filed January 8, 1998; and County Defendants' Supplemental Motion for Summary Judgment on Plaintiffs' [sic] Civil

Rights Claims (County's Supplemental Motion) (Docket No. 108), filed August 5, 1998. The Court, having considered the pleadings submitted by the parties, including cross-referenced statements of undisputed material facts and affidavits submitted with previously ruled upon motions and supplemental pleadings, the oral argument of counsel at hearing, and the applicable law, and otherwise being fully advised, finds that City's Motion No. III is well taken and will be **granted**, County's Motion is well taken in part and will be **granted in part**, City's Motion No. VI is well taken in part and will be **granted in part**, City's Motion No. VII is well taken and will be **granted**, and County's Supplemental Motion is well taken and will be **granted**.

FACTUAL BACKGROUND

This suit stems from a most unfortunate event, the shooting of sixty-nine year old Ralph Garrison by members of the Albuquerque Police Department (APD) and the Bernalillo County Sheriff's Office (BCSO) at his home on December 16, 1996, while they were executing a search warrant on Mr. Garrison's adjacent rental property. Mr. Garrison subsequently died of his wounds. The relevant facts in this case have been extensively developed through affidavits and depositions.

In early December 1996, an APD investigation turned up evidence of a criminal conspiracy involving stolen and counterfeit checks, counterfeit United States currency, and other felony white-collar activity, the proceeds of which were used in part by the conspirators to supply their methamphetamine drug habits. A coconspirator told investigators that equipment used to make counterfeit

documents was kept at a residence located at 2615 Quincy N.E. Further investigation revealed that this property was *rented by certain other coconspirators* from Ralph Garrison, who resided at 2619 Quincy N.E. There was no evidence linking Mr. Garrison to the criminal activities.

A search warrant for 2615 Quincy was issued on December 13, 1996. For a variety of reasons, including the determination that detectives in the White Collar Crimes Unit were neither adequately trained nor suitably equipped to execute the warrant against the potentially armed and violent suspects expected to be present in the two "fortified"[1] structures on the property, APD's Special Weapons and Tactics (SWAT) Unit agreed to plan and carry out the operation. Execution of the warrant was tentatively scheduled for December 16, 1996, at 9:00 a.m. After reviewing relevant information regarding the suspects and surveying the subject location and adjacent neighborhood several times, including from the air in a United States Customs Service helicopter, an APD SWAT officer determined that, due to pedestrian and vehicular traffic, 6:00 a.m. would be the safest time of day to serve the warrant. He also concluded that more SWAT officers than were available to the APD SWAT Unit would be needed to safely and effectively enter the buildings on the property. Thus, the assistance of the BCSO SWAT Team was secured. After further joint planning by officers of both SWAT units, the final plan for execution of the warrant was

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[1] The property was protected by a tall fence with a locking gate, wrought iron bars on the front door and windows of the front structure, a wrought iron door on the rear structure, and a Rottweiler dog in the backyard.

approved: The search warrant was to be served at 6:00 a.m., with the APD SWAT Unit entering the main residence and the BCSO SWAT Team securing the backyard and entering the rear structure.

Members of the APD SWAT Unit, BCSO SWAT Team, APD White Collar Crimes Unit, APD Air Support Unit, and an APD Tactical Emergency Medical Support (TEMS) officer met at 3:00 a.m. on December 16, 1996, to review plans for execution of the search warrant. APD Air Support officers showed a previously videotaped forward looking infrared[2] (FLIR) aerial view of 2615 Quincy and the surrounding area. They also announced that a United States Customs Service helicopter, equipped with a FLIR video camera and a Night Sun spotlight,[3] would hover at approximately 300 feet while the warrant was being executed and illuminate the property and surrounding area after the SWAT officers made their initial entry. Information concerning the criminal case, search warrant, and suspects was also provided. No information was given about Mr. Garrison or any other neighbor, however, as surveillance had revealed no reason to conclude that they posed a threat to the officers' safety. Accordingly, the officers were instructed to treat the threat posed by neighbors as "unknown." Diagrams of the staging area and subject property and RAP sheets and photos of the suspects were passed out. Participants were

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[2] A FLIR camera allows observation of people and objects on the ground in the absence of an ambient light source.

[3] At an altitude of about 300 feet, the Night Sun produces light sufficient for a person on the ground to read a newspaper at night.

briefed on the plan and assigned their specific responsibilities, which they then rehearsed. The APD and BCSO SWAT units then conducted individual team briefings covering their assigned duties.

The duty sergeant at the North Area Command was informed shortly after 4:00 a.m. that a search warrant would be executed at 2615 Quincy N.E. at approximately 6:01 a.m. that morning. Also, the Albuquerque Fire Department (AFD)was notified and asked to have a rescue unit standing by. At 4:20 a.m., APD radio dispatch (Valley III) was told of the operation and asked to send an APD Field Investigator to the warrant site sometime after 6:10 a.m.

Shortly after 5:30 a.m., the participants met at the staging area, a parking lot located closer to the Quincy address, where they were joined by a United States Secret Service Special Agent. The APD SWAT Unit officers wore black Nomex fatigue uniforms, Nomex balaclavas, and Nomex flight gloves. A 3 ½ by 4 ½ inch APD shoulder patch was sewn on the left arm of the fatigues and a 3 ½ by 4 ½ SWAT Unit patch on the right sleeve. Both patches were centered about one inch below the shoulder. Over the tactical uniforms the officers wore bullet-resistant body armor, with a cloth silver or gold APD badge sewn on the left breast area. Additionally, all wore equipment vests, bullet-resistant helmets, and safety goggles or glasses. They also carried specialized firearms, including hand guns, shot guns, and semi-automatic rifles. The BCSO SWAT Team deputies were similarly attired and equipped.

While waiting in the parking lot, the U.S. Customs pilot informed the participants that the lights were on in the

main residence at 2615 Quincy. Several officers who conducted a drive-by confirmed this information and stated that there was activity inside the residence. At approximately 6:00 a.m. the authorities proceeded to the warrant location in several APD vehicles, including a raid truck, "pull" vehicle, SWAT Unit equipment truck, and two K-9 vehicles, the BCSO SWAT Team raid truck and CNT truck, and an unmarked car.

On arrival at approximately 6:03 a.m., a deputy sheriff used the BCSO CNT truck to breach the gate on the south side of 2615 Quincy.[4] Another officer positioned the "pull" vehicle at the southeast comer of the property, in case it was needed to remove the wrought iron door on the front building. The raid truck was parked in front of the residence and APD SWAT team officers exited and took their positions. Officer Bledsoe drove his APD K-9 truck[5] north through the alley on the west side of the property, stopping next to a three foot high cinder block wall topped by a three foot chain link fence directly behind 2619 Quincy.

The APD SWAT Team entered the main residence through the unlocked front door, without using any forced-entry tools or flash diversionary devices. The building and its

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[4] The gate's lock was protected by a metal enclosure which prevented breaching tools from quickly and effectively removing the lock.

[5] The K-9 truck was marked as a police vehicle, with overhead emergency lights, APD badges on the driver and passenger's doors, and "CAUTION POLICE DOG" written in four-inch letters on the side.

occupant were secured in short order and the White Collar Crimes detectives then conducted the search.

As the APD SWAT Unit approached the front building, the BCSO SWAT Team secured the backyard area around the rear structure and provided cover to the entry team. Deputies Little[6] and Monteith positioned themselves in front of the combination cinder block wall and chain link fence[7] that separated 2615 Quincy from 2619 Quincy. As the Customs helicopter began to lower its hover to 300 feet, the County SWAT Team announced itself at the wrought iron door of the rear structure. There being no response, two deputies unsuccessfully attempted entry with a hand-held ram, halligan tool, and pry bar[8] while others loudly shouted, "Sheriff's Department! Search warrant!" Next a deputy shot two Remington 870 12-gauge, "shok lock," rounds into the lock mechanism, but the door still remained secure. Finally, the deputy shot two one-ounce, 12-gauge slug rounds into the lock and the door was opened with the pry bar. After a flash diversionary device was deployed through the door, the BCSO SWAT Team entered the structure. The helicopter

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[6] Deputy Little, who had spent several years as a canine officer, carried a black CO_2 fire extinguisher to pacify the reported guard dog, but no dog was found on the property.

[7] Chain link fencing, approximately three feet in height, topped a cinder block wall, which varied in height from about three feet to one foot as it ran from east to west.

[8] More than fifteen attempts were made to open the door in this manner.

hovered at 300 feet, illuminating the area with its Night Sun.[9] The time was approximately 6:05 a.m.

While the BCSO SWAT Team was attempting to enter the rear building, a man, later identified as Mr. Garrison, walked out of the rear of the house at 2619 Quincy, into the backyard. Deputy Little shouted standard departmental warnings at him: "Sheriff's Department." "We're executing a search warrant!" "Go back inside your house!" Mr. Garrison walked toward Deputy Monteith, saying, "What's going on? That's my property." Mr. Garrison did not appear to understand and the police continued giving their warnings. As Mr. Garrison looked directly at him, Deputy Monteith shouted, "Go back in your house! Sheriff's Department! Go back in your house!" Mr. Garrison, however, continued walking toward Deputy Monteith. Deputy Little repeatedly yelled, "Sheriffs Department! We're executing a search warrant! Go back inside your house!" He also shouted, "Police Department! We're executing a search warrant!" At the same time, Officer Bledsoe,[10] standing next to the K-9 truck in the alley behind the Garrison house, yelled twice, "Police Department! Go back inside!" Detective (Det.) Maez, also in the alley, shouted "Police Department! Go back inside!" and turned around so Mr. Garrison could see the word "POLICE" written in six-inch block letters on the back

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[9] The helicopter also recorded the warrant service on its FLIR videotape system.

[10] APD K-9 Officer Bledsoe wore a tactical uniform similar to that of the APD SWAT Unit.

of his raid jacket.[11] When Mr. Garrison got to within seven to ten yards, Deputy Little again yelled at him to go back inside his house. Mr. Garrison finally stood only about seven feet away from and looked directly at Deputy Monteith, who ordered him to go back inside his house. Mr. Garrison responded, "That's my property," and slowly walked back inside his house. Deputy Monteith then heard Deputy Little say something like, "I hope he doesn't come out with a gun." Deputy Monteith thought this was a possibility and that he should be careful.

This initial encounter with Mr. Garrison lasted approximately one minute. The area was illuminated by the helicopter's Night Sun spotlight[12] and none of the officers shined any flashlights or spotlights at Mr. Garrison.[13] When

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[11] Det. Maez's jacket also had a patch on the left shoulder and a badge on the front.

[12] Lighting conditions were undoubtedly poor, particularly from Mr. Garrison's viewpoint. Based on a subsequent APD reinactment, "only vague silhouettes could be seen in the backyard of 2615 Quincy" from Mr. Garrison's bedroom window and "[t]he same conditions were present at the back doorway. The spotlight from the helicopter made body shapes easier to see but only for brief moments." (Pl's. Resp. County's Motion (Docket No. 71), Ex. E at 9; *see id.* Ex. F at 7 ("It was pretty poorly lit. . . . It was all pretty dark. Everything was done by flashlight. . . . [T]here was some illumination from the US Customs A Star, their helicopter. But it wasn't much. . . .").)

[13] Plaintiff questions this fact by quoting a transcription of the "911" call compiled by Det. Rick Foley on December 19, 1996: "[T]hey *had* flashlights in my face and everything." *(Id.* Ex. G at

the helicopter was released,[14] Officer Bledsoe illuminated the area by the rear door of 2619 Quincy with the spotlight on his K-9 Unit vehicle.

At approximately 6:05:30 a.m., Mr. Garrison called "911"[15] and told Emergency Operator 90, Gilbert Duran, "It's at 2619 Quincy, NE. They're breaking into my house. A whole bunch of people." The Operator asked Mr. Garrison who was breaking in, how many people there were, and how they were trying to get in. Mr. Garrison responded that he didn't know who they were, but there was "a whole bunch of

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2 (emphasis added).) According to the transcription produced by Paul Ginsberg, President of Professional Audio Laboratories, Inc., however, Mr. Garrison said, "They've *got* flashlights on my face and everything. . . ." (Mem. Support City's Motion No. III (Docket No. 31) Ex. A. Attach. 2 at 2 (emphasis added).) Mr. Ginsberg described his qualifications and methodology in detail in his affidavit, which he closed by stating, "To a reasonable degree of certainty, it is my expert opinion that the transcript of Mr. Garrison's 911 call fairly and accurately represents the words spoken and recorded on the Dictaphone logger tape." *(Id.* Ex. A ¶ 24.) Plaintiff provides no other support for her supposition that flashlights were shined in Mr. Garrison's face when he went into his backyard to investigate, and the Court has found none. Rather, the evidence by affidavit and deposition is that none of the officers did so.

[14] The helicopter was released when execution of the search warrant was completed by entering and securing both buildings at 2615 Quincy.

[15] The quoted language is from the transcription produced by Paul Ginsberg. *(Id* Ex. A, Attach. 2.)

people out there" and they wouldn't let him go out. He estimated there were three to five people and said that he didn't know exactly "because they've got flashlights and everything out there." He stated that they were using axes, hammers, and "all kinds of things," to break in and declared, "I got a gun. I'm gonna go up there and shoot 'em."

The Operator requested that Mr. Garrison remain on the phone and told him that he was "getting somebody out there." The Operator continued questioning Mr. Garrison, asking for a description. Mr. Garrison answered, "They've got flashlights on my face and everything. . . . I'm gonna get my gun." The Operator persisted, asking, "Do you know who they are?" Mr. Garrison replied, "2619. I don't even know nobody or nothin'. Please. Please. I'm gonna go out there, please, thank you. My name is Ralph Garrison." The Operator then said, "Okay, just stay on the phone with me, okay?," to which Mr. Garrison responded, "Okay, I can't, I gotta go see what's happening out there." About twenty seconds later, the Operator told Mr. Garrison, "Okay, just stay on the phone sir. I'm getting somebody out there. Can you see what they're doing?" Mr. Garrison answered, "They're breaking in with axes and [unintelligible]. Please hurry up. Please hurry up. They got flashlights and cars and trucks and all kinds of stuff back there. Please, please hurry up. I'm gonna go out there now. Thank you." The Operator then inquired whether Mr. Garrison could take the phone with him and when Mr. Garrison answered, "Yes," asked him to do so. Mr. Garrison then stated, "They got the lights and everything in my face. . . . Oh yes, I can't see, I can't see, I can barely see nothing what's going on. . . . . I got my gun. I'll shoot the sons of bitches."

At 6:08:22 a.m., an unknown officer is heard saying, "Drop the gun." Another officer follows immediately with, "Put that down." Shots were fired at 6:08:24 and white noise ensued. When deputies reached Mr. Garrison immediately following the shooting, he was lying on the floor inside the glass rear storm door. A fully loaded and cocked .22 caliber nine-shot High Standard brand revolver lay near his feet.

APD SWAT Unit Officer Neal Terry participated in the entry of the main residence at 2615 Quincy. Once that structure was secured, he proceeded to clear the side yard, looking for the Rottweiler, and then, at approximately 6:06 a.m., moved to the backyard to determine if the BCSO SWAT Team required assistance. They had already entered the rear structure, so Officer Terry joined Deputies Little and Monteith at the fence.[16] They were directing their attention toward the rear door of 2619 Quincy, which was illuminated by the K-9 Unit vehicle's spotlight, and was about thirty-five feet away. After discussing the BCSO SWAT Team's entry into the rear structure, Deputy Little described the initial encounter with Mr. Garrison and told Officer Terry that the deputies were providing cover for the BCSO SWAT Team and the White Collar Crimes Unit from any potential threat posed by Mr. Garrison or any other hostile persons who were

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[16] Other officers in the area at this time included Det. Lucero, leaving the rear structure for the main residence, Deputy Eldredge, picking up casings outside the door of the rear structure, Acting Lieutenant (A/Lt.). Bozell, standing a few feet away from Deputy Eldredge and about three feet from Deputy Monteith, and Sergeant Simonson and Deputy Lucero, standing by the BCSO CNT truck by the breached entry gate on the south side of 2615 Quincy.

inside 2619 Quincy. Deputy Little also said something to the effect, "Watch this guy come out with a gun now."

As the conversation continued, Deputy Monteith yelled, "Drop the gun," and then, "Put it down." Mr. Garrison was standing behind the glass storm door of his residence. He moved into the doorway, holding what appeared to be a single action, Colt pattern semi-automatic pistol in his right hand and another object in his left hand.[17] Because Deputy Little was standing between him and the doorway at 2619 Quincy, Officer Terry moved to the right, raised his AR-15 rifle, and trained it on Mr. Garrison.

As Mr. Garrison began opening the storm door with his left hand, he raised the pistol to eye level and pointed it in the direction of Deputy Monteith and the other officers located in that direction. When Det. Lucero, who was standing behind Deputy Monteith, saw that the muzzle of the gun was pointed directly at him, he moved for the cover of the rear building and began to draw his weapon. A/Lt. Bozell and Deputy Eldredge also took cover. Officer Terry, in response to a perceived immediate threat of deadly assault against his fellow officers, fired one round at Mr. Garrison. Seeing Mr. Garrison still standing with the gun raised in his hand, Officer Terry fired a second shot. Deputies Little and Monteith, perceiving similar threats to themselves and the other officers, also fired shots at Mr. Garrison.

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[17] This was later identified as a telephone.

After Mr. Garrison fell from view, Officer Lopez and several deputies[18] entered the backyard of 2619 Quincy and approached the rear door of the residence. Deputies Little and Eldredge reached the back door first and found Mr. Garrison conscious and lying on the floor with the revolver near his feet. As Deputy Little opened the storm door, an aggressive dog stepped over Mr. Garrison toward the officers. Deputy Little shot the Chow.[19]

Deputies Reese and Archibeque remained with Mr. Garrison, who was lying on his back, moving,[20] apparently

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[18] Officer Terry remained at his position at 2615 Quincy and never entered the Garrison property. All of the Sheriff's Department personnel present, except Deputy Fermin Ortega, entered the Garrison residence at some point following the shooting.

[19] Officer Little recognized that the Chow was about to attack and believed it to be a threat to the officers' safety. They could not safely enter and clear the house while the dog was unrestrained and it also prevented medical personnel from entering to assist Mr. Garrison. Deputies could not use chemical mace against the Chow in the confined area of the work room where Mr. Garrison lay without contaminating themselves and medical personnel.

[20] A/Lt. Bozell and Deputy Gonzales stated at their depositions that they did not see Mr. Garrison move as they passed by him into the house. Neither of them, however, stayed with Mr. Garrison, as did Deputies Reese and Archibeque. Both Deputy Reese and Deputy Archibeque testified that Mr. Garrison was moving while they guarded him. It was on being informed of this fact that Deputy Gonzales ordered them to handcuff Mr. Garrison.

making some attempt to sit up. When advised by Deputy Reese that Mr. Garrison was moving, Deputy Gonzales told Deputy Reese to handcuff him for safety reasons.[21] Deputy Archibeque proceeded to handcuff Mr. Garrison, while Deputy Reese covered him with his rifle. Mr. Garrison had been shot in the torso and right wrist. Part of his wrist was missing; there was a "U" shaped wound about halfway into the wrist. Deputy Archibeque applied a cuff to Mr. Garrison's uninjured wrist first, rolled him on his side and then to his stomach, and placed the other cuff on "as gently" as he could to the injured wrist. Mr. Garrison was handcuffed for a few minutes. Once the sweep was completed, Officer Lopez requested medical assistance for Mr. Garrison. APD TEMS Officer Madrid responded and administered basic life support to Mr. Garrison until the house was secured and on-the-scene AFD paramedics could begin their treatment. Officer Madrid assisted in transporting Mr. Garrison to a hospital.

In the meantime, Officer Lopez and other deputies conducted a protective sweep of the house, looking for other suspects.[22] Mrs. Molly Garrison was the only other person

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The Court therefore does not find any genuine issue of material fact as to the issue of whether Mr. Garrison was moving.

[21] At this time, Deputy Gonzales, who was involved in the protective sweep of the house, was not aware of the severity of Mr. Garrison's injuries.

[22] None of the suspected dangerous individuals were found during the execution of the search warrant at 2615 Quincy. The only person present when the warrant was executed was the woman who had originally informed police that counterfeiting equipment

the officers found.[23] Deputy Eldredge encountered Mrs. Garrison, in her night clothes, walking with her walker toward the bathroom adjacent to her bedroom. He twice asked Mrs. Garrison to stop and not go to the bathroom because he needed to search it.[24] Mrs. Garrison did not wait, but went into the bathroom. Deputy Eldredge then told her not to close the door and did not allow her to do so. He maintained continuous eye contact with her while she remained in the

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was kept at that location. She was arrested and told officers that two of the suspects had left minutes before the arrival of the APD and BCSO SWAT teams. Thus, the officers believed that those suspects or other unknown assailants could be at 2619 Quincy.

[23] Mrs. Garrison later recounted that on the morning of December 16, she was awakened by banging and woke her husband by calling to him in the next room. Because of all the lights, she told him, "Look at the house is [sic] on fire." Mr. Garrison got up and went toward the kitchen to get the portable phone. He was gone for "[m]aybe a few minutes, and that's all," and Mrs. Garrison could not see him while he was gone. When he returned he went into his bedroom and she heard him talking on the phone. He then was going out again and when Mrs. Garrison followed him, he told her to go back to her room, which she did. She returned to her bed, from which she could not observe the kitchen or the back door, and she never saw her husband again.

[24] Local law enforcement officers have been trained not to let people go into bathrooms or other rooms and close the door before the room has been secured by authorities. This policy apparently stems from the shooting of an APD officer several years before this incident. The officer allowed a male subject to go into the bathroom. The subject subsequently came out of the bathroom with a gun and shot the officer.

bathroom. Officer Little passed through the bedroom at that time and observed that Mrs. Garrison was sitting on the toilet and that the door was open. After Mrs. Garrison left the bathroom, Deputy Lucero went in and checked to ensure there wasn't anybody else present. He also looked for any weapons, including inside the medicine cabinet. Mrs. Garrison then went back into the bathroom and was allowed to close the door.

As she walked back to her bed from the bathroom Mrs. Garrison saw that deputies were moving her furniture in the living room. Although deputies asked her to wait on the couch in the living room, she chose and was allowed to remain in her bed. Deputies also searched her room and closet, removing everything from her drawers. Although she asked the deputies who they were, what they were looking for, and what was going on, they did not tell her anything. Once the area was secured, however, Deputies Eldredge and Lucero removed their balaclavas, to improve their communication with her and in an attempt to put her more at ease.

Mrs. Garrison appeared to the officers to be in frail condition and in need of assistance in caring for herself.[25] As

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[25] Mr. Garrison provided around-the-clock care for his wife, who was "infirm and could only walk a few steps at a time with a walker." (Second Am. Comp. at ¶ 20.) In her deposition testimony on March 12, 1997, Mrs. Garrison said she was dependent upon her husband twenty-four hours a day as her nurse and housekeeper and to help her walk. She stated that with the aid of her walker she could go to the living room, kitchen, and bathroom, but that she never went as far as the back of the house.

all personnel were needed to secure the crime scene and investigate the shooting, Officer Lopez and A/Sgt. Rodriguez agreed that a relative should be contacted. Mrs. Garrison's son, Benny Garrison, was called. Deputies Lucero and Eldredge stayed with Mrs. Garrison until he arrived at about 7:00 a.m. A/Sgt. Rodriguez briefly explained to him what had occurred that morning and officers helped take Mrs. Garrison to her son's vehicle.

PROCEDURAL BACKGROUND

Mrs. Garrison filed suit on her behalf and as the personal representative of her husband' s estate on December 23, 1996. On July 28, 1997, she amended the complaint. She filed her Second Amended Complaint for Civil Rights Violations and State Tort Claims on October 3, 1997, asserting claims for unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments, supervisory and official capacity liability for violation of constitutional rights, conspiracy to violate civil rights under 42 U.S.C. § 1983, wrongful death caused by law enforcement officers' assault and battery, false imprisonment by law enforcement officers, and negligence of law enforcement officers causing enumerated torts. Over the course of this case, Defendants have filed eleven motions for dismissal or partial summary judgment. On November 14, 1997, the Court heard oral argument on all then pending motions. At that time, City's Motions Nos. III and VI and County's Motion were taken under advisement, in whole or in part, pending

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Deposition testimony by Mrs. Garrison taken on June 13, 1997, has also been submitted in part to the Court.

further discovery and supplemental briefing. (*See* Order, filed March 31, 1998.) Plaintiff filed her Amended Supplemental Response on March 25, 1998, and Defendants City and County responded on March 31, 1998, and April 2, 1998, respectively. Additionally, the City filed its Motion No. VII on January 8, 1998, and the County its Supplemental Motion on August 5, 1998, both of which address issues related to those in the Motions previously taken under advisement.

ANALYSIS

Section 1983 Claims

1. Unreasonable Seizure of Mr. Garrison

Plaintiff asserts that Defendants seized Mr. Garrison without probable cause and used excessive force by shooting him and subsequently handcuffing him, in violation of the Fourth and Fourteenth Amendments. Both the City and the County move for summary judgment on the Plaintiff's unreasonable seizure claim on grounds of qualified immunity. (City's Motion Nos. III and VII and County's Motion and Supplemental Motion.) Their arguments will be considered together.

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time

the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Thus, once a defendant pleads qualified immunity, the burden shifts to the plaintiff "to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988).

The defense of qualified immunity is, as a practical matter, of limited value in excessive force cases. This is because police use of excessive force is a clearly established violation of constitutional rights. The focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force used was objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor. *Quezada v. County of Bernalillo,* 944 F.2d 710, 718 (10th Cir. 1991). Thus, "the qualified immunity and excessive force analysis do not differ in any significant respect." *Diaz v. Salazar,* 924 F. Supp. 1088, 1093 (D.N.M. 1996).

The Fourth Amendment's protections regarding a "seizure" are triggered "only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham v. Connor,* 490 U.S. 386, 395 n.10 (1989)(quoting *Terry v. Ohio,* 392 U.S. 1, 19, n.16 (1968) and citing *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989)); *see also County of Sacramento v. Lewis,* 118 S.Ct. 1708, 1715 (1998)("[A] Fourth Amendment seizure [occurs] only when there is a governmental termination of freedom of movement through

means intentionally applied.")(quoting *Brower,* 489 U.S. at 596-97). A § 1983 claim of use of excessive force during a seizure is analyzed by determining "whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances," *Allen v. Muskogee,* 119 F.3d 837, 840 (10th Cir. 1997)(citing *Graham,* 490 U.S. at 397; *Thompson v. City of Lawrence,* 58 F.3d 1511, 1516 (10th Cir. 1995)):

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Diaz, 924 F. Supp. at 1093 (ellipses in original) (quoting *Graham,* 490 U.S. at 396-97). The inquiry, then, requires the Court to examine "whether the totality of the circumstances justified a particular sort of . . . seizure," giving consideration to factors such as the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether the subject is resisting arrest or attempting to avoid arrest. *Tennessee v. Garner,* 471 U.S. 1, 8-9 (1985).

The excessive force inquiry includes "not only the officers' actions at the moment that the threat was presented, but also *may* include their actions in the *moments* leading up

to the suspect's threat of force." *Allen,* 119 F.3d at 840 (emphasis added). Reasonableness "depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct *during the seizure* unreasonably created the need to use such force." *Id.* (emphasis added)(quoting *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995)). Thus, an officer's conduct prior to the suspect's threat of force will be considered by the Court if that conduct is "'*immediately connected*' to the suspect's threat of force." *Id.* (emphasis added)(quoting *Romero v. Board of County Comm'rs,* 60 F.3d 702, 705 n.5 (10th Cir. 1995)); *see also Diaz,* 924 F. Supp. at 1096 ("To the extent pre-seizure conduct is immediately connected, both contemporaneously and causally, to the eventual seizure at issue, that conduct should be examined in determining the objective reasonableness of the force employed to effect the seizure.").

A. Shooting

Defendants maintain that the actual seizure of Mr. Garrison, his being shot by Officer Terry and Deputies Little and Monteith while pointing a gun in their direction, was reasonable and, thus, not a constitutional violation of Mr. Garrison's Fourth Amendment rights. They also contend that in December 1996 the law was not clearly established whether acts immediately connected to the seizure/shooting, those allegedly creating a dangerous situation necessitating the shooting of Mr. Garrison by the police, were relevant in assessing the reasonableness of the officers' actions. *Compare Wilson v. Meeks,* 52 F.3d 1547, 1554 (10th Cir. 1995) (citing *Quezada,* 944 F.2d, at 717), *and Plakas v. Drinski,* 19 F.3d 1143, 1148-49 (7th Cir. 1994), *with Sevier,*

60 F.3d 695, *and Diaz,* 924 F. Supp. 1088. Finally, they argue that even if the preceding acts during the first encounter with Mr. Garrison are considered, Defendants' behavior was lawful.

Plaintiff asserts that Defendants are liable because they generated the necessity to kill Mr. Garrison by recklessly causing him to engage in an assault, that their reckless conduct prior to, but immediately connected with the shooting, created the need to use deadly force against Mr. Garrison. Plaintiff contends that there are genuine issues of material fact as to whether the noise generated by the entry into the rear structure at 2615 Quincy would have caused a reasonable person in Mr. Garrison's position to fear for the safety of his tenants and rental property, causing him to arm himself; whether Defendants knew or recklessly disregarded that Mr. Garrison did not know that they were police officers and that he might, therefore, return with a gun; whether the first encounter was immediately connected to the second; and whether, in light of their knowledge, the officers acted unreasonably in failing to take cover, failing to tell other officers in the yard to take cover, and failing to make another attempt to tell Mr. Garrison who they were.

There is no dispute that Mr. Garrison had a gun in his hand as he began opening his rear storm door at approximately 6:08 a.m. on December 16, 1996, and that he aimed his gun in the direction of Deputy Monteith and the other officers in that area. It therefore was reasonable for Officer Terry and Deputies Little and Monteith to believe that their lives and those of their fellow officers were in danger at that moment and to respond by shooting Mr. Garrison. *See Wilson,* 52 F.3d at 1554 ("Any police officer in Officer

Meeks' position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver pointed in his general direction.").

The Fourth Amendment does not require use of the least intrusive means, only reasonable ones. *Wilson,* 52 F.3d at 1553-54; *United States v. Melendez-Garcia,* 28 F.3d 1046, 1052 (10th Cir. 1994). The standard, then, is whether from an objective viewpoint and taking all factors into consideration, the police react reasonably to a threat. *Wilson,* 52 F.3d at 1553-54; *Melendez-Garcia,* 28 F.3d at 1052. Officer Terry and Deputies Little and Monteith did so. They reasonably feared for their and their colleagues' lives and they reacted reasonably to that threat. The Fourth Amendment does not require more. *See Diaz,* 924 F. Supp. at 1100 ("[P]olice are not . . . constitutionally required to respond to a suspect's threat of deadly force with non-deadly force or the least intrusive amount of force."); *see also United States v. Myers,* 106 F.3d 936, 940 (10th Cir. 1997)(early morning "military-style assault" in execution of search warrant at suspected marijuana growing operation in home with sleeping children, including battering down door and deployment of "flash-bang" device by agents dressed in black uniforms and wielding automatic machine guns, objectively reasonable).

Finally, even though Defendants may have had a statutory obligation to again warn that they were police before discharging their weapons, violations of state law and police procedure generally do not give rise to a § 1983 claim. *Romero,* 60 F.3d at 705. Furthermore, mere negligent actions precipitating a confrontation are not actionable under § 1983.

Diaz, 924 F. Supp. at 1097 (quoting *Sevier*, 60 F. 3d at 699 n.7).

There is no evidence in this case that any Defendant made a deliberate or reckless decision to escalate the encounter with Mr. Garrison into a deadly confrontation.[26] *See id.* Therefore, considering the facts and circumstances not only of the seizure itself, when Mr. Garrison appeared at his rear door, pointed his gun at the officers, and was shot by them, but also of Defendants' acts and omissions previous to the seizure, including their method of entry of the rear structure and what transpired while Mr. Garrison was in his backyard and when he returned to his house, the Court finds that Defendants' actions were objectively reasonable and that they are entitled to qualified immunity as to the unreasonable seizure claim with regard to the shooting.

B. Handcuffing

Plaintiff also brings an excessive force claim with regard to the handcuffing of Mr. Garrison as he lay on his back several feet away from his weapon, not speaking, bleeding from his torso and missing a large part of his right wrist, and under constant surveillance by enforcement officers. She asserts that handcuffing him was futile and cruel because the gun lay on his right side and his right wrist was clearly and severely incapacitated. Defendants Gonzales,

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[26] Even Plaintiff's expert testified at deposition that, "I think that the initial encounter with Mr. Garrison was in fact reasonable and appropriate." (Pl's. Am. Supplemental Resp. Defs.' Mots. Summ. J. (Docket No. 97), Ex. F at 36.)

Archibeque, and Reese, however, contend that they are entitled to qualified immunity because the handcuffing was reasonable under the circumstances. (County Defs.' Reply County's Supp. Motion (Docket No. 110) at 2-5.)

The Tenth Circuit Court of Appeals addressed the issue of handcuffing an injured assailant in *Wilson*. 52 F.3d 1547. There, Officer Meeks twice shot Mr. Wilson, who fell to the ground face down with his gun underneath him. Officer Stock arrived moments later and disarmed Mr. Wilson by placing his foot on the back of Mr. Wilson's knee to prevent him from trying to shoot, holding him by the shoulder, and locating the gun underneath his body. A police lieutenant arrived soon afterward, prior to the arrival of medical help, and ordered Officer Stock to handcuff Mr. Wilson. No medical care or first aid was given until the arrival of fire department emergency medical technicians. When the technician requested that the handcuffs be removed so Mr. Wilson could be turned on his side to facilitate his breathing, the lieutenant, the only officer then present, refused to do so and told the technician to remove them. It took a minute or two find the key to the handcuffs and remove them. The technician then performed CPR, spelled by the lieutenant, but Mr. Wilson died shortly after arriving at the hospital, according to plaintiffs' experts not of the gunshot wounds, but of asphyxiation. Plaintiffs brought a claim for failure to render medical aid and defendants moved for summary judgment based on qualified immunity.

Applying the Eighth Amendment standard of deliberate indifference to the due process rights of pretrial detainees, the court addressed the handcuffing to the extent it prevented Mr. Wilson from helping himself to breathe.

Finding that the officers could not be expected to know their actions would exacerbate a medical problem, the court also noted

> the detainee was armed and could have posed a threat to human life. As defendants correctly note, the first duty of a police officer is to ensure the safety of the officers and the public. Handcuffing is a necessary expedient to this end. Handcuffing an armed assailant, even after he has been shot, is not a constitutional violation.

Id. at 1556. Thus, the court found no constitutional violation under the Eighth Amendment, specifically commenting, however, that the handcuffing could raise a question of excessive force as it is a forceful seizure, but that question was not at issue. *Id.* at 1547 n.2.

Plaintiff directs the Court to *Howard v. Dickerson,* 34 F.3d 978 (10th Cir. 1994), a case discussed by the *Wilson* court, and *Palmer v. Sanderson,* 9 F.3d 1433 (9th Cir. 1993), in support of her Fourth Amendment excessive force claim. The Court finds Plaintiff's cases inapposite, given the very different circumstances involved here. At the time Mr. Garrison was handcuffed, the situation was very much in flux: Mr. Garrison had only moments before aimed his gun at officers and been shot, and the officers were in the process of conducting a protective sweep of his residence, not knowing who else was present or whether other weapons were available, but believing other dangerous and armed suspects might well be there. Concern for the safety of the officers and others was immediate and real. Additionally, there is no

evidence that there was any intent on the part of the deputies to cause harm to Mr. Garrison in handcuffing him or that the handcuffing adversely affected Mr. Garrison's condition. Deputy Archibeque stated that he put the handcuff on Mr. Garrison's injured wrist "as gently as [he] could," and they were removed after "a few minutes." In light of the surrounding facts and circumstances, the actions of the deputies with regard to handcuffing Mr. Garrison were objectively reasonable and cannot be found to amount to a use of excessive force. *Cf. Fundiller v. City of Cooper City*, 777 F.2d 1436, 1438, 1441 (11th Cir. 1985)(finding "question is close" in reversing dismissal of substantive due process claim of use of excessive force where undercover agent suddenly, without provocation or warning, shot plaintiff five times; other officers did not render aid but dragged him out of car, shackled his hands behind him, exacerbating one wound, stated they hoped he would bleed to death and shouted obscenities at him while he lay face down on ground).

2. Unreasonable Search

Defendants move for summary judgment on Plaintiff's claim that the search of 2619 Quincy violated her Fourth Amendment rights. (City's Motion No. VII; County's Supplemental Motion.) Plaintiff maintains that Defendants exceeded the permissible scope of a protective sweep of the residence by moving furniture in the living room and searching the drawers in her bedroom and the bathroom cabinet.

A protective sweep is "a quick and limited search of premises, . . . narrowly confined to a cursory visual inspection of those places in which a person might be hiding."

Maryland v. Buie, 494 U.S. 325, 326 (1990). It is conducted incident to an arrest to protect the safety of police officers and others. *Id.* In *Buie*, the Supreme Court held that:

> as an incident to the arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the scene.

Id. at 334.

Although Plaintiff contends that moving furniture in the living room exceeds the scope of a protective sweep, the Court does not agree. Mr. Garrison had just threatened the officers by pointing a loaded gun at them. The officers had no idea who was present at 2619 Quincy; the dangerous suspects who they believed were at 2615 Quincy were not found during the execution of the search warrant there and it was not unreasonable, considering Mr. Garrison's actions, for the officers to believe they might be at 2619 Quincy. Therefore, it was prudent of them to investigate the possible presence of other armed and dangerous persons in the vicinity. *See United States v. Tisdale,* 921 F.2d 1095, 1097 (10th Cir. 1990). Moving furniture to ascertain whether persons are hiding behind it is certainly within the ambit of such a search and

Plaintiff has offered no evidence as to what furniture was moved or that Defendants moved furniture for any other purpose.

The search of Mrs. Garrison's bedroom drawers and bathroom cupboard, of course, cannot be justified on grounds of a protective sweep for dangerous persons. This search, however, is valid considering the exigencies of the situation present under the circumstances of this case. *See Warden v. Hayden,* 387 U.S. 294, 298-99 (1967) (necessity for speedy investigation to protect police officers' lives or lives of others justified warrantless entry and search for persons and weapons to insure suspect was only one present and that police had control of all weapons which could be used against them or to effect escape).

Although Plaintiff argues that Deputy Lucero had no reasonable suspicion that Plaintiff posed any danger at all to Defendants, the Court cannot agree. Mrs. Garrison remained in her bedroom and made use of the adjacent bathroom. Mr. Garrison had just aimed a gun at Defendants and a gun in Mrs. Garrison's hand would have posed no less danger to them. Therefore, the limited search for weapons in the drawers and cupboard in these areas to which Mrs. Garrison was given access did not violate her rights. *See United States v. Hernandez,* 941 F.2d 133, 135-38 (2d Cir. 1991) (quick search for weapons in area around bed where officer intended to place non-suspect, handcuffed female, including drawers next to bed and between mattress box and spring, justified to neutralize threat of physical harm)(citing and discussing *Terry,* 392 U.S. 1; *Michigan v. Long,* 463 U.S. 1032 (1983); and *Buie,* 494 U.S. 325).

3. Unreasonable Seizure of Mrs. Garrison

Defendants move for summary judgment on Plaintiff's unreasonable seizure claims. Mrs. Garrison asserts that Defendants seized and detained her without reasonable suspicion, in violation of her Fourth Amendment rights. Specifically, she claims Defendants exceeded any community caretaking function and acted unreasonably in following her around, watching her use the toilet, and refusing to tell her what had happened to her husband and allowing her to go to him.

Law enforcement officers have occasion to seize a person for a variety of reasons, some of which have nothing to do with a desire to prosecute for crime. *United States v. King,* 990 F.2d 1552, 1560 (10th Cir. 1993)(quoting *Terry,* 392 U.S. at 13). "Indeed, police officers are not only permitted, but expected, to exercise . . . 'community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.* (quoting *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973)). Such purposes include seizures to "ensure the safety of the public and/or the individual." *Id.* Whether such a seizure is reasonable under the Fourth Amendment first "depends upon whether it is based on specific articulable facts and requires a reviewing court to balance the governmental interest in the police officer's exercise of his or her 'community caretaking function' and the individual's interest in being free from arbitrary government interference." *Id.*

The second prong of the reasonableness inquiry requires a court to determine "whether the officer's action is

'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 1562 (quoting *Terry,* 392 U.S. at 20). The focus is on "whether the facts available to the officer would 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* (quoting *Terry,* 392 U.S. at 21-22.) Such evaluation is to be guided by "common sense and ordinary human experience," *id.* (quoting *United States v. Sharpe,* 470 U.S. 675, 685 (1985)), and while the officer is not required to use the least intrusive means during the course of the detention, the Court must determine whether "failure to use less intrusive means was unreasonable," *id.* at 1562-62 (citing *Sharpe,* 470 U.S. at 686-87).

Officers encountered Mrs. Garrison while conducting their protective sweep of 2619 Quincy after the shooting of Mr. Garrison. As discussed above, it was reasonable for them, in the interests of safety, to search the premises for anyone posing a danger. Initial detention of anyone found, including Mrs. Garrison, likewise was reasonable. Mrs. Garrison, however, was detained for about one hour while authorities contacted and awaited the arrival of her son. Given her physical condition, the nature of the events that had just transpired, and the needs of the police in securing and investigating the crime scene, Defendants had more than sufficient factual basis to exercise their community caretaking functions over Mrs. Garrison. Additionally, balancing the governmental interests at stake and Mrs. Garrison's right to be free from interference finds the former vastly outweighing the latter. Indeed, it is clear that Mrs. Garrison in all likelihood was unable to care for herself. Thus, Defendants detention of Mrs. Garrison must be found to have been justified at its inception and justified in its length.

Mrs. Garrison, however, complains of the degree of interference she experienced: Deputies Eldredge and Lucero were always present, watched her use the toilet in her bathroom, and would not answer her questions as to what was happening. Considering the circumstances of this case, that the deputies stayed with Mrs. Garrison until her son arrived certainly falls within the realm of common sense. Additionally, under the circumstances, the Court cannot find that the deputies' failure to tell Mrs. Garrison what had happened or to allow her to go to her husband was inappropriate. Furthermore, while their act of watching her use the toilet was certainly highly intrusive, it too was reasonably related in scope to facts initially justifying Mrs. Garrison's detention, the safety of the officers. Until officers could search the areas immediately available to Mrs. Garrison for weapons, it was reasonable of them to keep her under constant surveillance. Just as the search of the bathroom cupboard and bedroom drawers was justified, so, too, was the act of keeping Mrs. Garrison under watch until the search could be completed. As Defendants maintain, anyone, even the elderly and infirm, should be considered a threat if he or she has access to a gun. Therefore, as Mrs. Garrison has not stated a violation of a constitutional right, Defendants are entitled to qualified immunity.

4. Section 1983 Claims Against APD Radio Dispatchers and 911 Operators

Defendant APD Radio Dispatchers Baca, Patrick, and Marquez and 911 Operator Duran move for summary judgment on the § 1983 claim. (City's Motion No. VI.) Mr. Duran took Mr. Garrison's call to "911." The computers were down when the call came in, so Mr. Duran was unable

to enter the information he gathered and send it to a dispatcher. Instead, Mr. Duran stood up and said that somebody had a gun, there were several subjects outside, and it was on Quincy, thus inquiring if any of the dispatchers present knew of a police operation on Quincy. Ms. Marquez, who was sitting right on front of Mr. Duran, turned around and told him that there was a possible SWAT call on Quincy, but she didn't know if it was his address. Mr. Duran looked at Ms. Marquez, but did not answer her as he was still on the call.

Plaintiff argues that the dispatchers and operators personally participated in the constitution deprivations she alleges because such deprivations would not have occurred but for their conscious withholding of information from Mr. Garrison: that despite knowing of the overwhelming likelihood that the people Mr. Garrison called about were police officers, Mr. Duran did not tell this to Mr. Garrison. She also maintains that these Defendants acted unreasonably in acquiescing to Mr. Garrison when he said he had a gun and intended to go to the back door and not telling him to remain in his house and put down the gun.

As the Court has already determined that the officers on the scene at Quincy are entitled to summary judgment on each of Plaintiff's constitutional claims, the same must be held with regard to the APD dispatchers and 911 operators. Additionally, these Defendants acts and/or omissions in no way meet the requisite level of reckless or deliberate conduct necessary to sustain a § 1983 claim. *See Sevier,* 60 F.3d at 699 & n.7.

5. Supervisory Liability, Official Capacity Liability, and Conspiracy

Having found Defendants entitled to summary judgment on Plaintiff's constitutional claims, the Court also will grant County Defendants summary judgment on her supervisory liability, official capacity liability, and conspiracy claims, (County's Motion, County's Supplemental Motion). *See Thompson,* 58 F.3d at 1517. The Court also notes that there is no evidence of any affirmative link between Sheriff Bowdich, Captain Linthicum, or Captain Stebleton and the BCSO deputies who allegedly violated Plaintiff's constitutional rights. *See Woodward v. Worland,* 977 F.2d 1392, 1400 (10th Cir. 1992). Additionally, there is absolutely no evidence of any failure to take action, train, or supervise or longstanding custom, practice, or policy of deliberate indifference by the County Defendants regarding violations of the constitutional rights of persons with whom their subordinates came into contact. Finally, there is also no evidence of any conspiracy in this case.

State Law Claims

1. Negligence of APD Dispatchers and 911 Operators

City Defendants move for summary judgment on the state tort claims asserted against the APD radio dispatchers and 911 operators. (City's Motion No. VI.) They maintain that these individuals are immune from suit. The Court agrees.

Pursuant to the New Mexico Tort Claims Act, "any public employee while acting with the scope of duty [is]

granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. N.M. Stat Ann. § 41-4-4(A)(Michie 1996 Repl. Pamph.). This general grant of immunity is waived for certain enumerated torts committed by law enforcement officers:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

Id. § 41-4-12. "Law enforcement officer" is defined as

> any full-time salaried public employee of a governmental entity whose *principal duties* under law are to hold in custody any person accused of a criminal offense, *to maintain public order* or to make arrests for crimes, or members of the national guard when called to active duty by the governor.

Id. § 41-4-3(D)(emphasis added).

Defendants Baca, Patrick, Marquez, and Duran contend that they are not "law enforcement officers" within the meaning of the Tort Claims Act. Plaintiff responds that their principal duties fall within the statutory element of "maintaining public order." Neither party has alerted the Court to any New Mexico case that addresses whether police dispatchers or 911 operators are law enforcement officers under the Act, and the Court has found none, but other case law is informative.

Whether an individual is a law enforcement officer for purposes of the Tort Claims Act is "determined by examining 'the character of the principal duties involved, those duties to which employees devote a majority of their time.'" *Weinstein v. City of Santa Fe,* 121 N.M. 646, 650, 916 P.2d 1313, 1317 (1996)(quoting *Anchondo v. Corrections Dep't*, 100 N.M. 108, 110, 666 P.2d 1255, 1257 (1983)). Determination of whether an individual's principal duties are "to maintain public order" requires "review of the employee's day-to-day duties, responsibilities, and activities" which are then "measured against the admittedly amorphous standard of the duties and activities traditionally performed by law enforcement officers." *Coyazo v. State,* 120 N.M. 47, 50, 897 P.2d 234, 237 (Ct. App. 1995). This determination is "fact specific, but informed by a practical, functional approach as to what law enforcement entails today." *Id.* at 51, 897 P.2d at 238.

The Human Services Department's job classification and compensation descriptions for APD radio dispatchers and 911 operators respectively provide:

General Statement of Duties

> [Police Dispatcher]: Operate a communications console consisting of Computer Aided Dispatch system, Enhanced 9-1-1 and two-way radio systems. Coordinate and dispatch Police Officers in response to emergency and non-emergency calls for service. Coordinate and monitor the ongoing activities of field personnel. Operate the National Crime Information center (NCIC) and Albuquerque Computerized Telecom Information Orientation Network (ACTION) and teletype machine when necessary.
>
> [9-1-1 Operator]: Receive, evaluate, prioritize and relay 9-1-1 emergency calls for medical, police and fire services which require dispatch. Receive, evaluate, prioritize and relay non-emergency and ring-down lines.

(Mem. Supp. City's Motion No. VI (Docket No. 75) Ex. A at 2, 4.)

Additionally, the "Typical Duties and Responsibilities" listed for each job are:

> [Police Dispatcher]
> 1. Receive requests for emergency and non-emergency police assistance from 9-1-1 operator. Prioritize and dispatch appropriate and available officer(s) via voice transmission and/or Computer Aided Dispatch (CAD) system.

2. Receive, monitor and update information via radio transmission and/or CAD system concerning status and activities of officers.
3. Relay applicable NCIC, teletype and other essential information to officers concerning ongoing activities.
4. Answer and respond to phone calls from internal and external sources and service channel requests as well as inquiries by CADs/radio from Police Officers.
5. Perform the same duties as the 9-1-1 Operators and operate the NCIC and ACTION terminals and teletype machines as needed.
6. Maintain complete logs of calls on the service channel.
7. Perform other duties as they relate to the job.

[9-1-1 Operator]

1. Assume control of callers to 9-1-1, determine the nature of the emergency, obtain detailed and accurate information from the caller and relay the emergency information to the appropriate dispatcher.
2. Verify origination of emergency calls.
3. Receive, evaluate, prioritize and relay non-emergency and ring-down lines.
4. Maintain logs for runaways and abandoned vehicles.
5. Operate special hearing impaired telephones (TTY) to receive incoming calls for services.
6. Monitor special alarms tied into the 9-1-1 system.

7. May relay official and non-official messages to officers in the field.
8. Perform other duties as they relate to the job.

(*Id.*)

The comparison to be drawn then is "between the primary activities of the public employee in question and the normal commonplace activities of, for example a police officer on patrol." *Coyazo*, 120 N.M. at 50, 897 P.2d at 237. Applying this practical approach, it is clear that APD radio dispatchers and 911 operators are not engaged in the same activities as the officer on patrol. Rather, their duties are more analogous to those of secretaries or administrative assistants and as such, they are not "law enforcement officers." *See Weinstein,* 121 N.M. at 650 n.2, 916 P.2d at 1317 n.2 ("[P]olice secretaries and couriers would not be considered law enforcement officers under the Act because their principal duties do not include making arrests or keeping the peace."). Therefore, Defendants' Motion will be granted.

2. Assault and Battery

Officer Terry moves for summary judgement on Plaintiff's assault and battery claim. (City's Motion No. VI.) Under New Mexico law, for there to be a tortious assault, there must be an act, threat, or some other menacing conduct which causes another person to reasonably believe that he or she is in danger of receiving an immediate battery. *Baca v. Velez,* 114 N.M. 13, 15, 833 P.2d 1194, 1196 (Ct. App. 1992). Under the facts of this case, there is no way the Court can find that Mr. Garrison could "reasonably" believe that he was in danger of an immediate battery. During his first

encounter with the officers, not one of them threatened him by word, action, or other menacing conduct. No officer touched Mr. Garrison, approached him, or entered his backyard. The officers identified themselves and their mission and told him to return to his house, which he did. No one followed him or interfered with him while he recrossed his backyard and none of the officers had any contact with him while he remained in his house. The APD and BCSO officers were lawfully executing a search warrant at 2615 Quincy and none of their conduct was directed at Mr. Garrison, except to order him to return to his house at 2619 Quincy. Additionally, Officer Terry did not even participate in the initial encounter with Mr. Garrison. Thus, his Motion must be granted as to the assault claim.

As to the battery claim, Officer Terry argues that he is entitled to summary judgment on grounds that he acted in good faith and with probable cause. The New Mexico Supreme Court has recognized that

> [o]fficers, within reasonable limits, are the judges of the force necessary to enable them to . . . preserve the peace. When acting in good faith, the courts will afford them the utmost protection and they will recognize the fact that emergencies arise when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court.

Mead v. O'Connor, 66 N.M. 170, 173, 344 P.2d 478,479-80 (1959). When Mr. Garrison reappeared at his back door and aimed his gun at Defendants, he committed the crime of

aggravated assault. Perceiving an immediate threat of serious physical harm to himself and the other officers present, Officer Terry reacted in an objectively reasonable manner by shooting Mr. Garrison.

Although Plaintiff maintains that Defendants provoked Mr. Garrison and were somehow responsible for causing him to reappear with his gun and threaten them from his back door, this argument is unsupported by the facts or law. Plaintiff does not and cannot argue that Defendants had any duty to inform Mr. Garrison of their intention to serve a search warrant on his rental property. Additionally, Mr. Garrison had no legal right to point his gun at the officers or to use force in an attempt to interfere with their execution of the search warrant. *State v. Johnson,* 124 N.M. 647, 654, 934 P.2d 79, 86 (Ct. App. 1997)("[A] homicide by a private citizen . . . is justifiable only if 'necessarily committed . . . by lawful ways and means,' meaning that deadly force in the apprehension of suspected felons is justifiable only when the citizen has probable cause to believe he or she is threatened with serious bodily harm or the use of deadly force.")(quoting N.M. Stat. Ann. § 30-2-7(C)); *Brown v. Martinez,* 68 N.M. 271, 280, 361 P.2d 152, 159 (1961)("[S]ince the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury where only the property is threatened."). Therefore, Officer Terry's Motion also will be granted as to the battery claim.

3. False Imprisonment

City Defendants move for summary judgment on Mrs. Garrison's false imprisonment claim. (City's Motion No. VII.) False imprisonment involves "unlawful interference with the personal liberty or freedom of locomotion of another." *Martinez v. Sears, Roebuck & Co.*, 81 N.M. 371, 373, 467 P.2d 37, 39 (Ct. App. 1970). Confinement in jail or custody is not required, and the requisite restraint

> may arise out of words, acts, gestures or similar means which induce reasonable apprehension that force will be used if the plaintiff does not submit and it is sufficient if they operate upon the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries.

Id. Reasonable cause, however, is a defense to a claim of false imprisonment. *Diaz v. Lockheed Elecs.*, 95 N.M. 28, 30, 618 P.2d 372, 374 (Ct. App. 1980)(citing and discussing *Stienbaugh v. Payless Drug Store, Inc.*, 75 N.M. 118, 401 P.2d 104 (1965)).

Defendants maintain that they had reasonable cause to restrain Mrs. Garrison and the Court agrees. As discussed in regard to Mrs. Garrison's unreasonable seizure claim, the officers, as a matter of law, had reasonable cause to restrain her for their and her protection, to meet their community caretaking responsibilities, and to allow the investigation into the shooting to proceed. Thus, summary judgment will be granted as to Mrs. Garrison's false imprisonment claim.

IT IS HEREBY ORDERED that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim, (Docket No. 30), filed July 17, 1997, is **GRANTED**.

IT IS FURTHER ORDERED THAT Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997, is **GRANTED IN PART** as to the unlawful seizure claims regarding Mr. and Mrs. Garrison, official capacity liability, supervisory liability, and conspiracy.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997, is **GRANTED IN PART** as to the assault and battery claim against Officer Terry, and the § 1983 and state law claims against the APD radio dispatchers and 911 Operators.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VII: Qualified Immunity for Defendant Officers Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 85), filed January 8, 1998, is **GRANTED**.

IT IS FURTHER ORDERED that County Defendants' Supplemental Motion for Summary Judgment on

Plaintiffs' Civil Rights Claims (Docket No. 108), filed August 5, 1998, is **GRANTED**.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed March 31, 1998]

No. CIV 96-1801 LH/DJS

MOLLY GARRISON, individually and as the personal representative of the ESTATE OF RALPH GARRISON, deceased,
Plaintiff,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON,

DEPUTY ERIK LITTLE, DEPUTY)
JAMES MONTEITH, DEPUTY JAMES)
GONZALES, DEPUTY PATRICK)
LUCERO, DEPUTY FERMIN ORTEGA,)
DEPUTY GREG REESE, DEPUTY)
DAVID ARCHIBEQUE, and DEPUTY)
VAN ELDREDGE in their individual and)
official capacities,)
Defendants.)
)

ORDER

THIS MATTER came on for consideration of City Defendants' Motion to Dismiss Gross Negligence, Negligent Execution of a Search Warrant, Negligent Use of Equipment, and Punitive Damages Claims (Docket No. 17), filed June 24, 1997; City Defendant's Motion for Partial Summary Judgment No. I: Qualified Immunity for Chief Polisar Against Fourth Amendment Excessive Force Claim (Docket No. 22), filed July 17, 1997; City Defendants' Motion for Partial Summary Judgment No. II: Qualified Immunity for Officer Terry Against Fourth Amendment "Illegal Search" Claim (Docket No. 26), filed July 17, 1997; City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (Docket No. 30), filed July 17, 1997; City Defendants' Motion for Partial Summary Judgment No. IV: Qualified Immunity for Officer Terry Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 34), filed July 17, 1997; City Defendants' Motion to Dismiss No. II: Fourteenth Amendment Substantive Due Process, Assault, and Battery

Claims (Docket No. 51), filed September 3, 1997; City Defendants' Motion for Partial Summary Judgment No. V: Qualified Immunity for Individual City Defendants Against the Estate's Fourteenth Amendment Substantive Due Process Claims (Docket No. 64), filed September 20, 1997; Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997; and City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997. Upon hearing oral argument on these Motions on November 14, 1997, and for the reasons set forth on the record in open court, the Court finds that City Defendants' Motion to Dismiss Gross Negligence, Negligent Execution of a Search Warrant, Negligent Use of Equipment, and Punitive Damages Claims; City Defendant's Motion for Partial Summary Judgment No. I: Qualified Immunity for Chief Polisar Against Fourth Amendment Excessive Force Claim; City Defendants' Motion for Partial Summary Judgment No. II: Qualified Immunity for Officer Terry Against Fourth Amendment "Illegal Search" Claim; City Defendants' Motion to Dismiss No. II: Fourteenth Amendment Substantive Due Process, Assault, and Battery Claims; and City Defendants' Motion for Partial Summary Judgment No. V: Qualified Immunity for Individual City Defendants Against the Estate's Fourteenth Amendment Substantive Due Process Claims are not well taken and will be **denied as moot**. The Court finds that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment

Excessive Force Claim will be taken under advisement, pending further discovery and supplemental briefing. The Court finds that City Defendants' Motion for Partial Summary Judgment No. IV: Qualified Immunity for Officer Terry Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims is well taken and will be **granted**. The Court finds that Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims will be **denied as moot in part** as to the issue of the use of the SWAT team during the execution of the search warrant; the Motion is not well taken as to the issue of the search of 2619 Quincy and will be **denied in part**; and the Motion will be taken under advisement in all other respects, pending further discovery and supplemental briefing. The Court finds that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators is well taken in part as to the supervisory liability and conspiracy claims and will be **granted in part**; the Motion is taken under advisement in all other respects, pending further discovery and supplemental briefing.

IT IS HEREBY ORDERED that City Defendants' Motion to Dismiss Gross Negligence, Negligent Execution of a Search Warrant, Negligent Use of Equipment, and Punitive Damages Claims (Docket No. 17), filed June 24, 1997; City Defendant's Motion for Partial Summary Judgment No. I: Qualified Immunity for Chief Polisar Against Fourth Amendment Excessive Force Claim (Docket No. 22), filed July 17, 1997; City Defendants' Motion for Partial Summary

Judgment No. II: Qualified Immunity for Officer Terry Against Fourth Amendment "Illegal Search" Claim (Docket No. 26), filed July 17, 1997; City Defendants' Motion to Dismiss No. II: Fourteenth Amendment Substantive Due Process, Assault, and Battery Claims (Docket No. 51), filed September 3, 1997; and City Defendants' Motion for Partial Summary Judgment No. V: Qualified Immunity for Individual City Defendants Against the Estate's Fourteenth Amendment Substantive Due Process Claims (Docket No. 64), filed October 20, 1997, are **DENIED AS MOOT**.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (Docket No. 30), filed July 17, 1997, is taken under advisement, pending further discovery and supplemental briefing.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. IV: Qualified Immunity for Officer Terry Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 34), filed July 17, 1997, is **GRANTED**.

IT IS FURTHER ORDERED that Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997, is **DENIED IN PART, DENIED IN PART AS MOOT**, and taken under advisement in part, pending further discovery and supplemental briefing.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory

Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997, is **GRANTED IN PART** and is taken under advisement in part, pending further discovery and supplemental briefing.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed October 12, 2000]

No. 99-2193
(D.C. No. CIV-96-1801-LH/DJS)

BEN GARRISON, as personal representative of the Estates of Ralph Garrison deceased and Molly Garrison, for Molly Garrison individually,
Plaintiff-Appellant,

v.

JOE POLISAR, Albuquerque Police Chief, JOE BOWDICH, Bernalillo County Sheriff, in their official and individual capacities; HOWARD NEAL TERRY, ERIK LITTLE, JAMES MONTEITH, Sheriff's Officers, in their individual capacities; LT. RUBEN DAVALOS, LT. J. R. DEBUCK, LT. JUDD SCHAFFER, SGT. KEVIN McCABE, Albuquerque Police Supervisors; STEVE RODRIGUEZ, Acting Sgt.; CHARLES LOPEZ, Albuquerque

Police Officer; CHRISTINA BACA,)
MARY PATRICK, MARY MARQUEZ,)
GILBERT DURAN, Albuquerque)
Police Dispatchers/Operators;)
SGT. KENNETH BOZELL,)
LT. LINTHICUM, CAPTAIN)
STEBLETON, Bernalillo County)
Sheriff's Supervisors; JAMES)
GONZALES, PATRICK LUCERO,)
FERMIN ORTEGA, GREG)
REESE, DAVID ARCHIBEQUE,)
DEPUTY VAN ELDREDGE,)
Bernalillo County Sheriff's Officers,)
Defendants-Appellees.)
)

ORDER

Before **TACHA**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **MAGILL**,* Senior Circuit Judge.

This matter is before the court on appellant's petition for rehearing and request for en banc review. We also have responses from the Bernalillo County defendants and the City defendants. Upon consideration of those pleadings, the petition for rehearing is denied by the panel of judges who heard this matter originally.

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* Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

The petition and responses were circulated to all the active judges of this court. *See* Fed. R. App. P. 35(a). No judge having called for a poll, the en banc suggestion is likewise denied.

PATRICK FISHER
Clerk of Court

by: /s/_____
Elisabeth A. Shumaker
Chief Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed August 25, 2000]

No. 99-2193

BEN GARRISON, as Personal Representative of the Estates of Ralph and Molly Garrison, *Plaintiff-Appellant,*	)
vs.	)
JOSEPH POLISAR, RUBEN DAVALOS, J.R. DEBUCK, JUDD SCHAFFER, KEVIN MCCABE, STEVE RODRIGUEZ, HOWARD NEAL TERRY, CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, JOSEPH BOWDICH, KENNETH BOZELL, DAVID LINTHICUM, LARRY STEBLETON, ERIK LITTLE, JAMES MONTEITH, JAMES GONZALES, PATRICK LUCERO, FERMIN ORTEGA, GREG REESE, DAVID ARCHIBEQUE, and VAN ELDREDGE in their individual	)

and official capacities,)
Defendants-Appellees.)
_____)

On Appeal from the United States District Court
for the District of New Mexico
The Honorable C. Leroy Hansen, District Judge
Dist. Ct. No. CIV 96 1801 LH/DJS

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Respectfully submitted,

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STATEMENT OF BASIS OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 35 (b)(1), Plaintiff-Appellant hereby states that the Panel Decision in this matter conflicts with decisions of the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit, namely:

- Allen v. City of Muskogee, 119 F.3d 837 (10th Cir. 1997);
- Myers v. Oklahoma County Board of County Commissioners, 80 F.3d 421 (10th Cir. 1996);
- Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995);
- United States v. Hogan, 38 F.3d 1148, 1149 (10th Cir. 1994); and,

- Salve Regina College v. Russell, 499 U.S. 225 (1991).

Consideration of this Petition is therefore necessary to secure and maintain uniformity of the Court's decisions.

Further, the proceeding involves a question of exceptional importance, specifically, whether in excessive force cases in which the defense of qualified immunity is raised, the trial court or the jury should decide the ultimate, merged inquiry of whether the defendant police officer's actions were objectively unreasonable.

ARGUMENT

In this civil action, Plaintiff Ben Garrison, as personal representative of the Estates of Ralph and Molly Garrison, sued Defendants Polisar, Davalos, DeBuck, Schaffer, McCabe, Rodriguez, Terry, Lopez, Baca, Patrick, Marquez, and Duran ("City Defendants"), and Defendants Bowdich, Bozell, Linthicum, Stebleton, Little, Monteith, Gonzales, Lucero, Ortega, Reese, Archibeque, and Eldredge ("County Defendants"), alleging that these Defendants violated Plaintiff's parents' Fourth Amendment rights when they shot and killed Mr. Garrison, seized and evicted Mrs. Garrison, and searched the Garrisons' home in the course of executing a search warrant next door. (Aplt. App. at 0353-68; 0959-60.) Plaintiff also alleged violations of state tort law based on these actions. (Id.)

The trial court entered three Orders addressing Defendants' several motions to dismiss and for summary judgment. On March 31, 1998, the trial court granted the City

Defendants summary judgment on Plaintiff's supervisory liability claims. (Id. at 0843-48.) On March 12, 1999, the Court granted the City Defendants summary judgment on all of Plaintiff's remaining claims, and granted the County Defendants summary judgment on Plaintiff's section 1983 claims. (Id. at 0961-0998.) Finally, on May 12, 1999, the trial court granted the County Defendants summary judgment on Plaintiff's state law claims, and dismissed the case. (Id. at 1015-17.) Plaintiff timely filed a notice of appeal on June 10, 1999. (Id. at 1018-19.) A panel of this Court affirmed the trial court's rulings by Order and Judgment filed August 11, 2000. (Petition Appendix.)

On December 16, 1996, in the dark of early morning, Defendants executed a warrant at 2615 Quincy. (Aplt. App. at 0965-66.) The warrant authorized a search of the premises and of certain named individuals suspected of counterfeiting documents. (Id. at 0963.) Ralph and Molly Garrison owned 2615 Quincy and resided next door at 2619 Quincy. (Id.) They rented 2615 Quincy to tenants. (Id.) Neither the Garrisons, nor 2619 Quincy, were subjects of the search warrant. (Id.) Mr. and Mrs. Garrison were visibly elderly. (Id. at 0914, 0962, 0974.)

On December 16, 1996, the Garrisons were awakened by what they believed to be an attack by thugs at their rental property. (Id. at 0973.) Defendants, officers of the Albuquerque Police Department and the Bernalillo County Sheriff's Department, had surrounded 2615 Quincy. (Id. at 0965-66.) A helicopter hovered overhead, and Defendants were using flash/bang devices, ramming tools, and 12-gauge shotgun "shok lock" rounds to enter 2615 Quincy. (Id. at 0967.) The clamor of Defendants' activities caused Mr.

Garrison to fear for the safety of himself, his wife, his property, and his tenants. (Id. at 0757-58.) He went out his back door to investigate. (Id. at 0967.) Visibility, from Mr. Garrison's perspective, was virtually nil, and the helicopter roared. Defendants shined lights in his face, (id. at 0234-37), and several officers simultaneously shouted "police" and "sheriff," and commanded him to return inside. (Id. at 0967.) He visibly did not understand what Defendants were saying, and remained outside until Defendant Little became "mad" and shouted at him to go back inside. (Id. at 0801-02.) Defendant Little acknowledged that Mr. Garrison appeared to be responding to the sound of the officers' voices without understanding. (Id.)

Defendants Little and Monteith knew that Mr. Garrison did not realize they were officers, and thought he might return outside "with a gun."[1] (Id. at 0758.) They communicated their concern to Defendant Terry. (Id. at 0758, 0970.) Nevertheless, these Defendants neither took advantage of copious available cover, nor warned other officers to do so. (Id. at 0758-59.) Further, they made no attempt to approach Mr. Garrison in a calm, intelligible manner, *e.g.*, by knocking on his front door, to explain to him that they were police officers. (Id.) There were numerous officers available to approach Mr. Garrison in this way. (Id.)

Meanwhile, Mr. Garrison called "911." (Id. at 0234-37.) Defendant Duran took Mr. Garrison's call. (Id. at 0657-

---

[1] Specifically, Defendant Little said to Defendants Monteith and Terry, "watch this guy come out with a gun now." (Aplt. App. at 0818, 0834.)

58.) Mr. Garrison gave his address, and said he thought armed robbers were breaking into his rental property next door. (Id. at 0234-37.) Defendant Duran knew that the people breaking in were officers. (Id.) He also knew that Mr. Garrison did *not* know this critical fact. (Id.) However, Defendant Duran did not so inform Mr. Garrison, even when Mr. Garrison told Defendant Duran that he was going back outside with a gun to shoot the intruders. (Id. at 0234-37.) Instead, Defendant Duran told Mr. Garrison to take the telephone with him, too. (Id.)

From ninety (90) seconds to several minutes after his first encounter with Defendants, Mr. Garrison returned to his back door, with his gun in one hand and his telephone in the other. (Id. at 0758.) He raised the gun, although he could see only "partial shapes." (See, e.g., id. at 0234-37, 0500-04.) Defendants Terry, Little, and Monteith, shouting "drop the gun," shot Mr. Garrison, inflicting the wounds of which he would soon die. (Id. at 0970-73.) The County Defendants entered 2619 Quincy, and found Mr. Garrison lying in the doorway. (Id. at 0971 .) Even though Mr. Garrison was under the constant surveillance of several officers, lying on his back gurgling but not moving, missing a large part of his wrist, and several feet away from any weapon, Defendants Reese and Archibeque handcuffed him under Defendant Gonzales' and Defendant Bozell's supervision. (Id. at 0900.)

Officers including Defendants Little, Monteith, Gonzales, Lucero, and Eldredge, searched the Garrison home. (Id. at 0903-04.) *Inter alia,* these officers moved living room furniture, and searched the Garrisons' medicine cabinet and bedroom drawers. (Id. at 0537-38, 0903.) Defendants also followed Mrs. Garrison around her home, watched her use the

toilet, and refused to tell her what had happened to her husband. (Id. at 0901-02.) Defendants later had Plaintiff Ben Garrison to remove Mrs. Garrison from her home to ease their investigation of the shooting. (See, e.g., id. at 0322-23, 0974.) Mrs. Garrison never saw her husband alive again. (Id. at 0973.)

I. THE COURT SHOULD GRANT REHEARING *EN BANC* IN THIS MATTER TO MAINTAIN THE UNIFORMITY OF ITS DECISIONS.

Federal Rule of Appellate Procedure 35 provides that rehearing *en banc* is appropriate when "necessary to secure or maintain uniformity of the Court's decisions." Fed. R. App. P. 35(a)(1); see also 10th Cir. R. 35.1(A) *(en banc* review serves to focus Court "on a panel decision that conflicts with a decision of the United States Supreme Court or of this [C]ourt"). The Panel Decision in the present matter seriously conflicts with the Supreme Court's and this Court's prior decisions in several respects. Plaintiff will address each of these conflicts in turn.

A. THE PANEL DECISION REJECTED ALLEN, MYERS, AND SEVIER, WHICH GOVERN PLAINTIFF'S EXCESSIVE FORCE CLAIMS BASED ON THE SHOOTING OF MR. GARRISON.

Plaintiff alleged that Defendants used excessive force in shooting and killing Mr. Garrison. The Court's decision in Allen v. City. of Muskogee, 119 F.3d 837 (10th Cir. 1997), cert. denied, 522 U.S. 1148 (1998), fully supports this claim. In Allen, the plaintiff raised excessive force claims on behalf

of her decedent, whom the defendant police officers shot and killed. Id. at 839. The defendants learned that the decedent was armed, suicidal, threatening family members, and had an outstanding arrest warrant against him. Id. When the officers found the decedent, he was sitting in the driver's seat of his car holding a gun. Id.

An officer named Smith ordered the decedent to drop his gun. Id. Smith approached the driver-side door, reached into the car, and tried to take the decedent's weapon. Id. Another officer grabbed the decedent's left arm, and a third officer tried to open the passenger door. Id. The decedent aimed his gun at the third officer, who ducked behind the car. Id. The decedent then aimed his gun at Smith and the second officer. Id. "[S]hots were exchanged," and the decedent was killed. Id. These events, from the officers' arrival to the shooting of the decedent, lasted about a minute and a half. Id.

This Court reversed the district court's grant of summary judgment for the defendants based on qualified immunity. Id. at 839-40. The Allen Court first noted that excessive force claims turn on "whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances." Id. at 840. Critically, the Court then observed that

> [t]he excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force. . . . The reasonableness of [d]efendants' actions depends *both* on whether the officers were in

> danger at the precise moment that they used force *and on whether [d]efendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.*

Id. (emphasis added). In Allen, this Court found that the officers' actions in the minute and a half before the shooting were immediately connected with the shooting and "should be included in the reasonableness inquiry." Id. at 841. The Court then held that a reasonable factfinder could find that the defendants' actions recklessly precipitated the need to use deadly force, and were therefore objectively unreasonable. Id. at 839-41.

The Court approved similar conclusions in Myers v. Oklahoma County Board of County Commissioners, 80 F.3d 421 (10th Cir. 1996), and Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995). In Myers, police officers entered the decedent's home even though they knew he was locked inside with a rifle, drunk and suicidal. 80 F.3d at 421. Not surprisingly, this episode ended with the officers shooting the decedent. Id. The district court denied the officers qualified immunity because "there was a genuine issue for trial regarding the reasonableness of defendants' conduct"; and, the appellate court lacked jurisdiction to review this decision. Id. at 424-25. Likewise, in Sevier, the trial court denied the defendant officers qualified immunity where they approached the decedent knowing he was armed and distraught, the decedent lunged at an officer with a knife, and officers shot and killed him. 60 F.3d at 698, 700-01 & n. 10. The Court approved the trial court's denial of qualified immunity, in part because "a jury could conclude that Defendants acted

recklessly by confronting [the decedent] in the manner they did." Id.

In the present matter, the record evidence demonstrates that Defendants' first encounter with Mr. Garrison was "immediately connected" with the second encounter in which Defendants shot Mr. Garrison almost instantly. See Allen, 119 F.3d at 841 (events occurring over minute and a half "immediately connected"). The record evidence also demonstrates that a reasonable factfinder could have concluded that Defendants recklessly precipitated the fatal encounter. According to Plaintiff's evidence, Defendants Little, Monteith, and Terry sat and waited with weapons drawn for Mr. Garrison to return, even though they knew that: (1) they had caused Mr. Garrison to believe they were breaking into his tenants' house and firing weapons; (2) Mr. Garrison did not know they were police officers; and, (3) Mr. Garrison was likely to return with a gun. This behavior was not reasonable; it was the conscious disregard of a substantial risk of serious harm, *i.e.*, it was reckless. (Aplt. App. at 0777-86.) In short, as in Allen, Myers, and Sevier, Defendants recklessly precipitated the need to use deadly force against Mr. Garrison, and their conduct was therefore objectively unreasonable.

In ruling to the contrary, the Panel Decision paid lip service to Allen, Myers, and Sevier, but in fact rejected them. After cursorily describing the facts establishing Defendants' recklessness (ignoring numerous facts and inferences in Plaintiff's favor), the Panel Decision states: "[t]he central fact is that when the fatal shots were fired, Ralph Garrison was aiming his gun at other officers at the scene." (Petition Appendix at 7.) However, Allen, Myers, and Sevier

specifically dictate that, when officers' reckless conduct precipitates a fatal encounter, the "central fact" is *not* that someone was aiming a gun at the officers, but that the officers recklessly caused him to do so. The Court should reject the Panel Decision's attempt to make the wrong fact "central" in this case, grant Plaintiff's petition for rehearing *en banc*, and reverse the trial court's summary judgment on Plaintiff's excessive force claims.

B. THE PANEL DECISION HELD THAT A FULL-BLOWN SEARCH WAS A "PROTECTIVE SWEEP" CONTRARY TO SUPREME COURT AND TENTH CIRCUIT PRECEDENT.

The Panel Decision also applied erroneous legal standards in affirming summary judgment for Defendants on Plaintiff's claims that Defendants illegally searched the Garrisons' home. The Panel Decision's sole reasoning in support of its ruling on this point is:

> [a]fter being shot, the officers followed Ralph Garrison into the house[2] where they made a "protective sweep" for their own safety. . . . Such, in our view, was . . . objectively reasonable.

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[2] This description is misleading because it suggests that Mr. Garrison went back into the house under his own power. In fact, Mr. Garrison was standing in the back doorway of his home when Defendants shot him and he fell backwards into the house. (Aplt. App. at 0970-73.)

(Petition Appendix at 7.) This perfunctory ruling directly contravenes Supreme Court and Tenth Circuit law dictating that Defendants' search of the Garrison home exceeded the scope of a "protective sweep."

"A protective sweep is not a full search, but rather a quick, cursory inspection of the premises, permitted when police officers reasonably believe, based on specific and articulable facts, that the area to be swept harbors an individual posing danger to those on the arrest scene." United States v. Hogan, 38 F.3d 1148, 1149 (10th Cir. 1994); Maryland v. Buie, 494 U.S. 325, 334 (1990); United States v. Parra, 2 F.3d 1058, 1066-67 & n. 4 (10th Cir. 1993). A protective sweep must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Hogan, 38 F.3d at 1150.

Defendants' search of the Garrisons' home patently exceeded the scope of a protective sweep, extending beyond places where a person could hide, to underneath living room furniture, and inside medicine cabinets and bedroom drawers. (Aplt. App. at 0537-38, 0903-04); compare, e.g., United States v. Richards, 937 F.2d 1287, 1291 (7th Cir. 1991) (officer did not exceed scope of protective sweep where he did not "search the drawers or dawdle"), with United States v. Ford, 56 F.3d 265, 270 (D.C. Cir. 1995) (looking under mattress and behind window shade exceeded scope of protective sweep). The Court should therefore grant Plaintiff's petition for rehearing *en banc,* apply the unequivocal Tenth Circuit law governing the permissible scope of protective sweeps, and reverse the trial court's summary judgment on Plaintiff's claims against Defendants based on the unreasonable search of the Garrison's home.

C. THE PANEL DECISION FAILED TO REVIEW ISSUES PROPERLY PRESERVED AND RAISED ON APPEAL CONTRARY TO SUPREME COURT AND TENTH CIRCUIT PRECEDENT.

It is axiomatic that the federal courts "are under a virtually unflagging obligation to exercise the jurisdiction given them." Newland v. First Nat'l Bank in Goodland, 82 F.3d 338, 341 n.2 (10th Cir. 1996) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).) Thus, an appellate court must consider questions placed before it, provided they are properly preserved and raised on appeal. Cf., e.g., Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999) (appellate court not obligated to review issue not raised below). This includes an obligation to conduct a careful, *de novo* review of legal questions, including questions of state law. Salve Regina College v. Russell, 499 U.S. 225, 231-40 (1991).

In the present matter, Plaintiff raised on appeal several properly preserved, substantial arguments that the Panel simply failed to review. For example, Plaintiff argued that Defendants used excessive force in handcuffing Mr. Garrison. Courts have determined that "no reasonable officer could believe that the abusive application of handcuffs was constitutional." Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); Martin v. Heideman, 106 F.3d 1308, 1311-12 (6th Cir. 1997). In the present matter, Plaintiff observed that Defendants' handcuffing of Mr. Garrison was both futile and cruel: Mr. Garrison, whose wrist had just been shot half away, was peculiarly unable to reach or manipulate a weapon, and obviously vulnerable to severe pain from pressure applied

to his wrist. The Panel Decision, however, did not even acknowledge this claim.

The Panel Decision also ignored Plaintiff's substantial claims against Defendant Duran, the 911 operator. Defendant Duran consciously withheld from Mr. Garrison the vital information that the persons Mr. Garrison believed to be armed robbers were in fact police officers. He withheld this information even when Mr. Garrison stated he was going to go back outside with a gun. Defendant Duran's behavior was quintessentially reckless, *i.e.*, involving the conscious disregard of a known risk of Mr. Garrison's or a police officer's death. See, e.g., Uhlrig v. Harder, 64 F.3d 567, 573 n.8 (10th Cir. 1995). These egregious actions led to Plaintiff's section 1983 and state tort claims against Defendant Duran. Nevertheless, the Panel Decision did not even mention these claims, much less justify the trial court's summary dismissal of them.

Finally, the Panel Decision did not review the trial court's dismissal of Plaintiff's intentional tort claims, but rather rubber-stamped them with the bare statement, "we are disinclined to disturb the district court's understanding of local New Mexico law or his application thereof to the present facts." (Petition Appendix at 8.) This is directly contrary to the Supreme Court's decision in Salve Regina College, which dictates that the Court of Appeals must undertake a careful, *de novo* review of state law questions, without deference to the trial court's 'local expertise.' 499 U.S. at 231-40. In short, the Panel Decision failed to review several issues of great significance in its apparent rush to reject Plaintiff's appeal at all costs, directly contrary to Supreme Court and Tenth

Circuit precedent.[3] The Court should therefore grant Plaintiff's petition for rehearing *en banc,* and reverse the trial court's grant of summary judgment on all of the above claims.

II. THE COURT SHOULD GRANT REHEARING *EN BANC* IN THIS MATTER TO RESOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE.

Rule 35 also provides that rehearing *en banc* is appropriate when "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2); see also 10th Cir. R. 35.1(A) (*en banc* review serves to focus Court "on an issue of exceptional public importance"). In the present matter, Plaintiff's appeal raised a highly significant question about the scope of qualified immunity in excessive force cases. The Panel Decision decided this issue against Plaintiff, *sub silentio,* in an unpublished Order and Judgment. The issue, however, is one that demands a clear, reasoned, and definitive resolution.[4]

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[3] The trial court appeared to be in a similar unseemly hurry to reject Plaintiff's case at all costs, failing to even rule on Plaintiff's state law negligence claims against Defendants before dismissing the entire case. (See generally Aplt. App. at 0353-68; 0843-48; 0961-98; 1015-19.)

[4] The fact that the panel decision is "unpublished" does not mean that the Court may safely leave the issue for another day. Tenth Circuit Rule 36.3 permits the citation of "unpublished" opinions, and these opinions are in fact published on computerized legal research databases such as Westlaw. For example, the panel decision in the present matter is readily accessible at Garrison v. Polisar, 2000 WL 1140256 (10th Cir. filed Aug. 11, 2000).

Ordinarily, qualified immunity is "a powerful defense." Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991), superseded on other grounds by Graham v. O'Connor, 490 U.S. 386 (1989). However,

> [t]he defense of qualified immunity is, as a practical matter, of limited value in excessive force cases. This is because police use of excessive force is a clearly established violation of constitutional rights. The focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force used was objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor. Thus, the qualified immunity and excessive force analys[e]s do not differ in any significant respect.

(Aplt. App. at 0976 (citations omitted)); Quezada, 944 F.2d at 718; Mick v. Brewer, 76 F.3d 1127, 1135 n.5 (10th Cir. 1996); see also Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991) (trial court erred in instructing jury separately on excessive force and qualified immunity because "the determination of liability and the availability of qualified immunity depend on the same findings."). Thus, there is only one, "merged" inquiry regarding excessive force, *i.e.*, whether Defendants' use of force against Mr. Garrison was objectively reasonable under all of the surrounding circumstances.

This Court has not directly addressed whether the judge or the jury should resolve the ultimate, merged inquiry.

Cf. Myers, 80 F.3d at 424-25 (declining to review trial court's decision that "there was a genuine issue for trial regarding the reasonableness of defendants' conduct"); Sevier, 60 F.3d at 701 n. 10 ("[J]ury could conclude that Defendants acted recklessly by confronting [decedent] in the manner they did."). Generally, entitlement to qualified immunity is a legal question for the court to decide. Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991). However, whether force is "excessive" or "objectively reasonable" is almost always a fact issue for the jury to decide. Quezada, 944 F.2d at 715; Street, 929 F.2d at 541. n.2. These two lines of authority come into conflict when the qualified immunity and excessive force analyses merge.

Because the reasonableness of a particular use of force is an exceptionally fact-intensive inquiry that must take into account the "totality of the circumstances," Graham, 490 U.S. at 396, the merged inquiry is more appropriately left to the factfinder. If the ultimate inquiry is *not* left to the fact finder, then it removes from the jury not only those cases in which the court finds that the force used *was* objectively reasonable, but also those cases in which the court finds that it *was not,* exposing defendants as well as plaintiffs to more frequent judgments as a matter of law. Such a trend is inappropriate to an inquiry so dependent on the innumerable details of context.

The Panel Decision never directly addressed this issue. (See generally Petition Appendix.) It did, however, decide the issue *sub silentio*. Specifically, the Panel Decision did *not* restrict its review of Plaintiff's excessive force claims to bare legal sufficiency under Federal Rule of Civil Procedure 56. Cf. Myers, 80 F.3d at 424-25; Sevier, 60 F.3d at 701. Rather, the Panel Decision improperly reached the ultimate

inquiry, *i.e.*, whether the force used was in fact objectively unreasonable. (See generally Petition Appendix at 5-7).

The question Plaintiff raises is of "exceptional public importance," 10th Cir. R. 35.1 (A), and should not be decided *sub silentio,* because its resolution will dictate the course of almost every excessive force case in the Tenth Circuit. Specifically, in almost every excessive force case, the officer raises the defense of qualified immunity. The trial judge must thus decide whether to determine for him or herself if the officer's actions were "unreasonable," or rather, to simply determine whether a reasonable factfinder *could* find that the officer's actions were unreasonable. Trial courts presently have only oblique guidance on this constantly recurring issue. The Court should resolve the question clearly, and hold that trial courts are simply to determine whether there is sufficient evidence of unreasonableness to go to a jury. The Court should grant Plaintiff's petition for rehearing *en banc,* and reverse the trial court's summary judgment in Defendants' favor on Plaintiff's excessive force claims on this basis.

CONCLUSION

The Panel Decision is in serious conflict with this Court's and the Supreme Court's clear precedents in numerous respects. The Panel Decision also resolves incorrectly, and without any reasoning whatever, the exceptionally important question whether the trial judge or the jury should ultimately decide whether an officer's use of force is objectively reasonable for purposes of qualified immunity. For all of the above reasons, Plaintiff respectfully requests that this Court grant this Petition for Rehearing and Suggestion of Rehearing *En Banc,* reverse the trial court's

granting of the City Defendants' motions for partial summary judgment Nos. III, VI, and VII, and the County Defendants' motions for summary judgment on Plaintiff's civil rights claims and motion to dismiss Plaintiff's state law claims, and remand this matter to the district court for trial on the merits on Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2000, I served the required number of true and accurate copies of Appellant's Reply Brief on the Clerk of the United States Court of Appeals for the Tenth Circuit and opposing counsel at the following addresses, by sending them to the Clerk of the Court via Federal Express, next day service, postage pre-paid, and by mailing them to opposing counsel:

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Supreme Court, U.S.
FILED
MAR 22 2001
CLERK

No. 00-1180

IN THE

Supreme Court of the United States

BEN GARRISON, as Personal Representative of the Estates of Ralph and Molly Garrison,

Petitioner,

v.

JOSEPH POLISAR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR CITY RESPONDENTS

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PARTIES TO THE PROCEEDING

Counsel for City Respondents represents Albuquerque Police Department ("APD") Chief Joseph Polisar, APD supervisors Lieutenant Ruben Davalos, Lieutenant Robert DeBuck, Lieutenant Judd Schaffer, Sergeant Kevin McCabe, and Acting Sergeant Steve Rodriguez, APD Officers Howard Neal Terry and Charles Lopez, and APD Dispatchers and 911 Operators Christina Baca, Mary Patrick, Mary Marquez, and Gilbert Duran. All of the individuals listed above were at all relevant times employees of the City of Albuquerque, New Mexico. Throughout this Brief in Opposition, the individuals listed above will be collectively referred to as "City Respondents."

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STATEMENT OF THE CASE

City Respondents do not dispute Petitioner's recitation of the procedural history of this case. However, the Petitioner presented his statement of the facts in a manner which dramatizes irrelevant information and omits undisputed material facts. (Petition at 5-7.) Instead, the evidence, viewed in the light most favorable to Petitioner, reveals the following:

On December 16, 1996, at approximately 3:00 a.m., Special Weapons and Tactics ("SWAT") officers from the Albuquerque Police Department ("APD") and the Bernalillo County Sheriff's Department ("BCSO") assembled at an APD police substation for a briefing prior to executing a Search Warrant for 2615 Quincy, N.E., in Albuquerque, New Mexico. At the briefing, the APD detective who applied for the Search Warrant provided the SWAT officers with information regarding the nature of the criminal case, the suspects' substantial and sometimes violent criminal histories, and the fortifications protecting the two (2) structures located at 2615 Quincy from entry. (*See* Petition at 19a.)

The APD detective in charge of the criminal investigation knew that the landlord for 261**5** Quincy, Ralph Garrison, resided at 261**9** Quincy. Mr. Garrison's house (261**9** Quincy) is located next door to 261**5** Quincy. Having uncovered no facts upon which to conclude that Mr. Garrison was involved in the criminal conspiracy or that he posed a threat to the safety of the officers, the APD detective did not provide the SWAT officers with any information regarding Mr. Garrison. (*See* Petition at 19a.)

Shortly before the 6:00 a.m. warrant execution time, a United States Customs Service helicopter pilot informed the officers that the lights were on inside the main residence at 2615 Quincy. Arriving at 2615 Quincy first, a BCSO deputy used the BCSO Crisis Negotiation Team truck to breach the gate which led to the backyard and the rear structure at approximately 6:03 a.m. As the gate was being breached, the BCSO SWAT officers stepped out of another truck and moved into the backyard of 2615 Quincy. (*See* Petition at 20a-22a.)

Within seconds of the BCSO officers' arrival, an APD SWAT raid truck parked in front of 2615 Quincy. At approximately 6:04 a.m., the APD SWAT officers exited the raid truck. After announcing their identity and purpose for being there, the APD officers entered the main residence through an unlocked front door. The officers quickly searched the entire structure. In less than a minute, the residence and its sole occupant at the time were secured. (*See* Petition at 21a-22a.)

As the SWAT officers arrived at 2615 Quincy, an APD K-9 officer and detective drove a K-9 Unit truck through an alley to an area directly behind 2619 Quincy. The K-9 Unit truck was clearly marked as a police vehicle, with overhead emergency lights, an APD badge covering the driver's side door, and the words "CAUTION POLICE DOG" written in red four inch (4") high block letters on the side of the unit. The K-9 officer parked his K-9 Unit truck next to a combination cinder block wall and chain link fence which separates 2619 Quincy from the alley.

As the APD SWAT officers entered the main residence at approximately 6:04 a.m., the BCSO SWAT officers moved

into the backyard of 2615 Quincy. Upon entering the backyard, BCSO Deputies Eric Little and James Monteith positioned themselves in front of the combination cinder block wall and chain link fence which separates 261**5** Quincy from 261**9** Quincy. The chain link fence in front of the deputies was approximately six feet (6') high, while the approximately three foot (3') high cinder block wall varied in height and became progressively shorter as it ran from east to west. (*See* Petition at 21a-22a.)

As the BCSO officers attempted to enter the rear structure, a man, later identified as Ralph Garrison, walked out of his 261**9** Quincy home and into his backyard. Upon seeing Mr. Garrison, Deputy Little shouted, "Sheriff's Department!"; "We're executing a search warrant!"; and "Go back inside your house!" As Mr. Garrison walked toward Deputy Monteith, Mr. Garrison stated "What's going on!" and "That's my property!" As Mr. Garrison looked directly at him, Deputy Monteith shouted at Mr. Garrison, "Go back in your house!"; "Sheriff's Department!"; and "Go back in your house!" As Mr. Garrison continued walking toward Deputy Monteith, Deputy Little repeatedly yelled out to Mr. Garrison, "Sheriff's Department!"; "We're executing a search warrant!"; and "Go back inside your house!" Deputy Little also shouted out "Police Department!"; and "We're executing a search warrant!" (*See* Petition at 23a-24a.)

While standing next to a fully marked APD K-9 Unit vehicle parked in the alley adjacent to 2619 Quincy, an APD K-9 officer yelled out to Mr. Garrison two times, "Police Department!" and "Go back inside!" Twice, the detective who was also standing in the alley yelled out to Mr. Garrison, "Police Department!" and "Go back inside!" Wearing a raid jacket with approximately six inch (6") high block letters spelling

"POLICE," the detective turned around so that Mr. Garrison could see his jacket. (*See* Petition at 23a-24a.)

When Mr. Garrison was approximately seven (7) to ten (10) yards away from him, Deputy Little *yelled* at Mr. Garrison to go back inside his house. Mr. Garrison finally stopped approximately seven feet (7') away from Deputy Monteith. While Mr. Garrison was looking directly at him, Deputy Monteith ordered Mr. Garrison to go back inside his house. Mr. Garrison responded with "That's my property!" turned around, and slowly walked back inside his house. (*See* Petition at 24a.)[1]

At approximately 6:05 a.m., Mr. Garrison placed a 911 call to an APD emergency operator. APD radio dispatch did not notify either the APD or BCSO officers that Mr. Garrison had made a 911 call in which he stated that "a whole bunch of people" were breaking into his rental property. Moreover, APD dispatch did not inform the APD or BCSO officers

1. All the deputies and officers who encountered Mr. Garrison displayed their badges of office and shoulder patches. The APD K-9 Officer displayed his silver-colored cloth replica badge and a 3½ inch high by 4½ inch wide APD shoulder patch on his left arm and a 3½ inch high by 4½ inch wide K-9 Unit shoulder patch on his right side. Deputy Little and Deputy Monteith displayed their bright gold colored BCSO badges and shoulder patches. In addition to their badges and shoulder patches, Deputy Little, Deputy Monteith, and the APD K-9 Officer were dressed in standard SWAT officer uniforms and carried standard issue equipment which is used by federal, state, and local SWAT teams throughout the country. During the deputies' and officers' approximately one minute encounter with Mr. Garrison, the approximately three foot high cinder block wall separating Mr. Garrison from the deputies did not block Mr. Garrison's view of the deputies' badges and shoulder patches. (*See* Petition at 20a-21a.)

that Mr. Garrison had armed himself with a gun, and had stated that he was going to shoot the "sons of bitches." (*See* Petition at 25a-26a.)

Meanwhile, BCSO officers entered the rear structure, finding no suspects or evidence. Once the Search Warrant execution was completed, the officers began performing their administrative duties (diagraming of the location, turning the scene over to the investigating detectives, collecting equipment, etc.). After the APD officers secured the main residence, APD Officer H. Neal Terry exited the residence and searched for suspects who might be lurking/hiding in the "side yard" of 2615 Quincy. Upon clearing the "side yard" of potential threats, Officer Terry walked to the back yard to determine if the BCSO officers needed his assistance. (*See* Petition at 27a.)

When he entered the backyard at approximately 6:06 a.m., Officer Terry saw that the BCSO SWAT officers had entered the rear structure and that the detectives and deputies were now performing their evidence collection and administrative duties. Officer Terry then saw Deputy Eric Little and Deputy James Monteith standing close to the fence which separates 2615 Quincy from 2619 Quincy and directing their attention toward the rear door of 2619 Quincy. (*See* Petition at 27a-28a.)

After walking over to that area, Officer Terry asked Deputy Little about the BCSO SWAT Team's entry into the rear structure. After briefly describing the entry, Deputy Little told Officer Terry that a man, Mr. Garrison, came out of the house next door. Deputy Little then told Officer Terry that the deputies and officers repeatedly identified themselves and told Mr. Garrison to go back inside his house. Deputy

Little then made a "tongue-in-cheek" comment to Officer Terry, "Watch this guy come out with a gun now." (*See* Petition at 27a-28a.)

As Officer Terry and Deputy Little were speaking, Deputy Monteith suddenly yelled "Drop the gun!" and "Put it down." Upon hearing the word "gun," Officer Terry immediately turned his attention away from Deputy Little and looked at the rear glass storm door leading into Mr. Garrison's house. (*See* Petition at 28a.)

As he stood in the doorway, Mr. Garrison held a handgun in his right hand and a telephone in his left hand. At the doorway, Mr. Garrison had the muzzle of the gun pointed toward the ground. When he began to open the door with his left hand, Mr. Garrison extended his right arm with the pistol in it. While holding his gun at eye level, Mr. Garrison pointed the muzzle of his gun in the direction of Deputy Monteith and the other officers and deputies in the area immediately behind the deputy. (*See* Petition at 28a.)

Immediately behind Deputy Monteith, Deputy Van Eldridge was picking up his casings from the rounds he fired to breach the door lock. Acting Lieutenant Bozell was standing just a few feet away from Deputy Eldridge, while Sgt. Adam Simonson and Deputy Patrick Lucero were positioned nearby. Supervising the investigating detectives' search for evidence, Detective Lucero was just leaving the rear structure and was headed for the main residence. (*See* Petition at 27a-28a.)

As Mr. Garrison pointed the muzzle of his gun at the officers, Officer Terry feared that Mr. Garrison was going to shoot at Deputy Monteith and the other deputies and officers

behind him. To immediately end the threat of a deadly assault against his fellow officers, Officer Terry fired one round from his AR-15 rifle at Mr. Garrison. Simultaneously, Deputies Little and Monteith fired their weapons for similar reasons. (*See* Petition at 28a.)

After his first shot, Officer Terry saw Mr. Garrison still standing with his gun raised toward the officers. At that point, Officer Terry continued to fear that Mr. Garrison would fire his gun at Deputy Monteith and the other deputies and officers behind him. To immediately stop Mr. Garrison's life threatening actions, Officer Terry fired a second shot. After firing the second shot, Mr. Garrison fell from view. (*See* Petition at 28a.)

REASONS FOR DENYING THE WRIT

The Petition failed to raise a compelling issue worthy of review by this Court. Petitioner crafted Question One in a manner which concealed the actual issue which he has asked this Court to decide. Specifically, Petitioner argued that the reasonableness test for the defense of qualified immunity and the reasonableness test for the merits of a Fourth Amendment excessive force claim have merged into a single inquiry. (Petition at 7-9.) Certainly a compelling question worthy of review, the so-called "merged inquiry" issue is currently before this Court. *See Saucier v. Katz*, __U.S. __, 121 S. Ct. 480 (2000). In this case, however, both the Tenth Circuit and the district court analyzed Petitioner's Fourth Amendment excessive force claim using the "merged inquiry" analysis urged by Petitioner. (Petition at 7a-8a & 35a.)

Reduced to its essence, Question One asked this Court to decide whether the judge or a jury should decide the "merged inquiry" for Fourth Amendment excessive force claims. With regard to this issue, the Tenth Circuit's implicit decision that a court, as opposed to only a jury, can decide the "merged inquiry" is not in conflict with the decisions of any other circuit. Although pressed by Petitioner, neither the Tenth Circuit nor the district court passed upon the issue actually raised by Petitioner in Question One.

Even if this Court decides that the review of Question One is within its jurisdiction, this case fails to raise a compelling Fourth Amendment issue worthy of review by this Court. Based on the undisputed facts which show that Mr. Garrison threatened the lives of officers and deputies with a gun, the Tenth Circuit correctly concluded that Officer Terry's use of deadly force did not violate the Fourth Amendment as a matter of law.

With regard to Question Two, Petitioner argued that the Tenth Circuit improperly "deferred" to the district court's determination of state law. With the district court having carefully researched and analyzed Petitioner's state law claims, however, the Tenth Circuit was not required to elaborate on its decision affirming the district court's dismissal of Petitioner's state law claims. For these reasons, this Court should deny Petitioner's Writ.

I. WITH REGARD TO QUESTION ONE, THE TENTH CIRCUIT'S IMPLICIT DECISION THAT A COURT, AS OPPOSED TO ONLY A JURY, CAN DECIDE THE "MERGED INQUIRY" IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

Assuming that this Court will decide that the reasonableness test for qualified immunity and a Fourth Amendment excessive force claim have merged into a single inquiry, Petitioner asked this Court to decide the following issue:

> Should the Court hold that the qualified immunity and excessive force inquiries merge, this holding will inevitably and immediately raise the question centrally at issue in this case. Specifically, once the merged inquiry is recognized, whether the judge or jury should resolve this inquiry must also be addressed.

(Petition at 10.) After revealing the actual issue before this Court, Petitioner then argued that excessive force claims almost always present questions of fact which only a jury may decide. (Petition at 10-11.)

However, Rule 56 of the Federal Rules of Civil Procedure and the controlling law do not support Petitioner's argument. Under Rule 56(c), the movant in any civil case:

> bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and

> admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (*quoting*, Fed. R. Civ. P. 56(c)). Once the movant has met its Rule 56 burden, the burden shifts to the non-moving party to establish the existence of a genuine issue for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 586-87 (1986). If the non-movant fails to show that there is a genuine issue as to any material fact the movant is entitled to summary judgment as a matter of law. *Celotex*, 477 U.S. at 322.

Moreover, the two (2) cases cited by Petitioner do not support his argument that a jury, not the courts, should decide excessive force questions. (Petition at p. 10) (*citing*, *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *cert. granted sum nom.*, *Saucier v. Katz*, __ U.S. __, 121 S. Ct. 480 (2000); *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000)). In *Katz*, the Ninth Circuit stated that " 'on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable.' " 194 F.2d at 970 n.5 (*quoting*, *Hopkins v. Andaya*, 958 F.2d 881, 855 (9th Cir. 1992)). In *McNair*, the Court stated the following:

> Judges rather than juries resolve immunity defenses, and a judge might conclude before trial — indeed, before discovery . . . — that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force.

234 F.3d at 355 (citation omitted). Accordingly, neither *Katz* nor *McNair* support Petitioner's argument.

Reduced to its core, Question One seeks a decision regarding whether a judge or a jury should decide excessive force claims. (Petition at 10-11.) Contrary to Petitioner's argument, Question One does not present an unsettled federal issue upon which the circuits are in conflict. Indeed, the clearly established law holds that a court may decide an excessive force case if there are no disputed issues of material fact. *Celotex*, 477 U.S. at 323. For this reason, this Court should deny Petitioner's request for certiorari with regard to Question One.

II. ALTHOUGH PRESSED BY PETITIONER, NEITHER THE TENTH CIRCUIT NOR THE DISTRICT COURT PASSED UPON THE ISSUE ACTUALLY RAISED BY PETITIONER IN QUESTION ONE.

The traditional practice of this Court precludes the grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . ." *Id.* Although Petitioner "pressed" Question One below, a review of the decisions below reveals that neither the Tenth Circuit Court of Appeals nor the district court "passed" upon Question One.

In its decision, the Tenth Circuit never passed on the issue of whether the trial court or jury should decide the question of objective reasonableness. (Petition at 1a-9a.) Simply stated, the Tenth Circuit's decision is silent with

regard to Question One. (*Id.*) Instead, the Tenth Circuit concluded that Petitioner failed to meet the burden to which all defending parties are held under Federal Rule of Civil Procedure 56:

> We agree that Officer Terry and the two other officers who fired at Ralph Garrison when he was aiming his weapon at other officers were "objectively reasonable [(sic)] in the light of surrounding facts and circumstances." Counsel argues that under *Allen*, which cited with approval *Sevier v. City of Lawrence, Kan.*, 60 F 3d 695, 699 (10th Cir. 1995), the defendants' "own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." We see no "reckless or deliberate" conduct by any of the defendants which in any way created "the need to use such force." In this regard, counsel stresses the fact that when Ralph Garrison returned to his residence after his first confrontation with the officers, one of the officers remarked that he hoped Garrison would not return with a gun. Counsel suggests that such utterance somehow proves that the officers' conduct somehow precipitated the second confrontation wherein the shooting occurred. We fail to see the connection. The central fact is that when the fatal shots were fired, Ralph Garrison was aiming his gun at other officers at the scene. Considering the circumstances, we agree that Officer Terry was acting "objectively reasonable." He did not have to wait for Garrison to fire the first shot.

(Petition at 7a-8a (footnote omitted).) Therefore, the Tenth Circuit did not pass upon Question One.

Following established Tenth Circuit law, the district court stated that "the focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force is objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor." (Petition at 35a (citation omitted).) However, the district court never passed on the issue of whether the trial court or jury should decide the question of objective reasonableness. (Petition at 15a-60a.) Like the Tenth Circuit, the district court concluded that Petitioner failed to meet his burden under Federal Rule of Civil Procedure 56. (Petition at 37a-40a.) Therefore, the district court did not pass upon Question One.

Although somewhat obscured by Petitioner, Question One requests a decision regarding whether a judge or a jury should decide excessive force claims. (Petition at 10-11.) However, neither the Tenth Circuit nor the district court passed upon Question One. *See Williams*, 504 U.S. at 41. For this reason, this Court should deny Petitioner's request for certiorari with regard to Question One.

III. BASED ON THE UNDISPUTED FACTS WHICH SHOW THAT MR. GARRISON THREATENED THE LIVES OF OFFICERS AND DEPUTIES WITH A GUN, THE TENTH CIRCUIT CORRECTLY CONCLUDED THAT OFFICER TERRY'S USE OF DEADLY FORCE DID NOT VIOLATE THE FOURTH AMENDMENT AS A MATTER OF LAW.

Even if this Court decides that the review of Question One is within its jurisdiction, this case fails to raise a compelling Fourth Amendment issue worthy of review by this Court. The Petitioner failed to show the existence of a

disputed issue of material fact. There being no evidence which disputes Officer Terry's assertion that he met the Fourth Amendment standard of objective reasonableness, the Tenth Circuit correctly concluded that Officer Terry's use of deadly force did not violate the Fourth Amendment as a matter of law.

In *Graham v. Connor*, 490 U.S. 386, 395 & 397 (1989), this Court created the "objective reasonableness test" which is the standard by which all Fourth Amendment excessive force (including deadly force) claims are judged. To determine the constitutionality of an officer's use of deadly force, this Court in *Graham* stated that the proper application of the "objective reasonableness test:"

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. * * * The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

Id. at 396-97 (citations omitted.)

In this case, the APD and BCSO SWAT Team officers used a reasonable amount of force to execute a high risk search warrant against armed and violent suspects who resided at 2615 Quincy. The deputies and officers, moreover, took reasonable precautions to ensure that their identity and authority were known to the suspects and citizens, such as Mr. Garrison. The undisputed evidence further shows that the officers' actions preceding the shooting did not cause Mr. Garrison to come out of his house a second time and point his gun at a "whole bunch of people" who were merely standing around next door. Tragically, Mr. Garrison, without the factual or legal justification to do so, threatened the lives of officers and deputies and ultimately brought about his own death. Accordingly, the officers' and deputies' conduct preceding the shooting was reasonable and did not create the need to use deadly force against Mr. Garrison.

Although a suspect has a fundamental interest in his life, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), the Fourth Amendment authorizes a police officer to use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others. . . ." *Id.* at 11. As long as the force actually used by an officer is reasonable, the clearly established Fourth Amendment law prohibits the consideration of less intrusive alternatives to end a deadly threat when determining the objective reasonableness of the use of deadly force.[2]

2. *See, e.g.*, *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) ("[t]he Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within the range of conduct which is objectively 'reasonable' under the Fourth Amendment"); *Scott v. Henrich*,

(Cont'd)

Moreover, "[t]he Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997). Instead, a police officer may "reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a [gun] pointed in his *general* direction." *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) (italics added).

It is undisputed that Mr. Garrison came to his rear door armed with a deadly weapon, a gun. (Petition at 6-7.) By raising his gun in the direction of Deputy Monteith and the other deputies and officers, Mr. Garrison committed the inherently violent felony of aggravated assault. *See Graham*, 490 U.S. at 396 (careful attention given to the severity of the crime). Although ordered to do so by Deputy Monteith, Mr. Garrison refused to put his gun down on the ground. *See Garner*, 471 U.S. at 11 (warning should be given if feasible). Accordingly, the undisputed evidence shows that Officer Terry could reasonably conclude that Mr. Garrison's actions created an immediate threat of serious physical harm to his fellow officers. *See id.* (deadly force proper where "the suspect threatens the officer with a weapon").

(Cont'd)

39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995) ("[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. * * * Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable"); *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994) ("[w]e do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* (sic) and *Graham v. Connor*").

In this tense, uncertain, and rapidly evolving situation Officer Terry made a split-second decision and shot Mr. Garrison twice as he pointed his gun at Deputy Monteith and the other officers. When Mr. Garrison threatened officers with serious physical harm, the Fourth Amendment did not prohibit Officer Terry's use of deadly force to defend the lives of his fellow officers. Accordingly, Officer Terry, based on the facts and circumstances confronting him, had probable cause to believe that deadly force was necessary to stop Mr. Garrison from causing serious physical harm.

In this case, Petitioner failed to meet his burden under Federal Rule of Civil Procedure 56 to demonstrate the existence of a disputed issue of material fact. (Petition at 7a-8a & 37a-40a.) There is simply no evidence which disputes Officer Terry's well-supported assertion that he met the Fourth Amendment standard of objective reasonableness. Therefore, the Tenth Circuit correctly concluded that Officer Terry was entitled to dismissal of the Petitioner's excessive force claim as a matter of law.

IV. WITH THE DISTRICT COURT HAVING CAREFULLY RESEARCHED AND ANALYZED PETITIONER'S STATE LAW CLAIMS, THE TENTH CIRCUIT WAS NOT REQUIRED TO ELABORATE ON ITS DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S STATE LAW CLAIMS.

With regard to Question Two, Petitioner argued that the Tenth Circuit improperly "deferred" to the district court's determination of state law. (Petition at p. 17). Petitioner further argued that the district court's opinion was not

"'exhaustive' as to many state law issues." (Petition at p. 20.) A review of the opinions below does not support Petitioner's argument.

According to the controlling case law, an appellate court's review of a district court's analysis of state law is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). This Court in *Salve* concluded that an "appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions." *Id.* at 233. "If [a] court of appeals [, however,] finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." *Id.* at 232-33.

A review of the district court's Memorandum Opinion and Order in this case reveals that its disposition of Petitioner's state law claims was well-researched and analyzed. In its opinion, the district court thoroughly analyzed all of Petitioner's state law causes of action, including its negligence claim against the APD dispatchers and 911 operators, (Petition at 50a-55a,) assault and battery claims, (Petition at 55a-58a,) and false imprisonment claims (Petition at 58a.) Simply because Petitioner disagreed with the district court's dismissal of his state law claims does not mean that the district court's opinion is unsupported by the controlling state law.

With the district court having carefully researched and analyzed Petitioner's state law claims, the Tenth Circuit was not required to elaborate on its decision affirming the dismissal of the Petitioner's state law claims. *Salve Regina College*, 499 U.S. at 232-33. Contrary to Petitioner's argument, the Tenth Circuit's decision is not properly

characterized as "deference" to the district court's interpretation of state law. The Tenth Circuit's decision is more accurately read as an expressed approval of the district court's carefully researched and reasoned opinion. (Petition at 9a.) For these reasons, this Court should deny Petitioner's request for certiorari with regard to Question Two.

CONCLUSION

For all the foregoing reasons, City Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 00-1180

Supreme Court, U.S.
FILED
MAR 20 2001
CLERK

In The

Supreme Court of the United States

BEN GARRISON, as Personal Representative of the Estates of RALPH and MOLLY GARRISON,

Petitioner,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON, DEPUTY ERIK LITTLE, DEPUTY JAMES MONTEITH, DEPUTY JAMES GONZALES, DEPUTY PATRICK LUCERO, DEPUTY FERMIN ORTEGA, DEPUTY GREG REESE, DEPUTY DAVID ARCHIBEQUE, and DEPUTY VAN ELDREDGE, in their individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' JOSEPH BOWDICH, KENNETH BOZELL, DAVID LINTHICUM, LARRY STEBLETON, ERIK LITTLE, JAMES MONTEITH, JAMES GONZALES, PATRICK LUCERO, FERMIN ORTEGA, GREG REESE, DAVID ARCHIBEQUE, and VAN ELDREDGE (BERNALILLO COUNTY RESPONDENTS) BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's opening statement that the ensuing presentation is of the "disputed facts of the case" is false and misleading. [Petition For Writ Of Certiorari (hereinafter "Petition"), p. 5.] Petitioner is attempting to suggest that the material facts are disputed and that the lower Courts did not properly apply summary judgment standards in deciding the case. That is patently untrue. Petitioner has consistently presented a slanted version of the facts and continues to do so in Petitioner's Statement of the Case. Petitioner mistakenly believes that viewing the evidence in the light most favorable to the non-moving party means that the court must ignore unfavorable facts and must accept speculative theories and unsupported allegations as factual evidence. Petitioner mistakenly believes that indulging all reasonable inferences in favor of the non-moving party means that the court must make huge leaps in logic. In fact, the courts below applied the appropriate standards. Respondents can point out mischaracterized testimony, omitted material facts, and other glaring insufficiencies in Petitioner's presentation of the facts without creating material fact issues. The material facts in this case are not disputed, and summary judgment was appropriate.

In this case, there is no dispute that the Bernalillo County Sheriff's Office (BCSO) deputies were present at 2615 Quincy assisting the Albuquerque Police Department (APD) in the execution of a valid search warrant. BCSO deputies Little and Monteith were designated perimeter men responsible for protecting the entry team from threats, including threats from north of the property where the Garrison residence was located. Mr. Garrison

exited his residence and approached Deputies Little and Monteith, who were wearing their badges of office and BCSO shoulder patches. These officers repeatedly told Mr. Garrison that they were police officers executing a search warrant and that Mr. Garrison should return to his house. Mr. Garrison was not assaulted, provoked, or threatened in any way. Mr. Garrison did return to his house, walking slowly and turning his back on the officers as he did so. Mr. Garrison was not prevented from returning to his house, nor did anybody chase after Mr. Garrison or do anything else to suggest that Mr. Garrison should fear for his safety. Nevertheless, after a lapse of time during which Mr. Garrison telephoned 911, and during which the officers executing the warrant had no further contact with Mr. Garrison, he returned to his back door with a loaded gun and immediately pointed the gun directly at the officers. It was only after Mr. Garrison's deadly assault that Monteith, Little, and APD Officer Terry fired shots at Mr. Garrison.

Petitioner does not and never has disputed the above-cited material facts. Instead, Petitioner adds unsupported allegations, misstatements of testimony, and speculative theories to suggest that, in spite of the above-cited undisputed facts, summary judgment is precluded. While Respondents do not feel any of the mischaracterizations or speculative theories are relevant or material, pursuant to Rule 15 of the Supreme Court Rules, Respondents feel that it is necessary to point out the misstatements made in the Petition.

Petitioner states that "Respondent Little acknowledged that Mr. Garrison appeared to be responding to the sound of the officers' voices without understanding."

[Petition p. 6.] This is a misstatement of Little's testimony. Respondent Little testified that *at first* Mr. Garrison appeared not to understand; however, Respondent Little went on to testify that when Mr. Garrison turned around and walked back to his house, Little believed that Mr. Garrison understood that Little and the other officers were police officers executing a search warrant. APD Officer Terry testified that Deputy Little's subsequent remark "Watch this guy come out with a gun now" was tongue-in-cheek.[1]

In similar vein, Petitioner states that when the officers entered the Garrison residence, Respondents handcuffed Mr. Garrison, even though Mr. Garrison was lying on his back "not moving." [Petition, p. 7.] Again, this assertion misstates deposition testimony. As the officers entered the residence to perform the protective sweep, some officers went through the house while two BCSO deputies, Respondents Reese and Archibeque, remained

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[1] As the Tenth Circuit pointed out, even accepting Petitioner's view that Deputy Little's statement was evidence that he harbored a suspicion that Mr. Garrison might return with a gun, it simply does not follow that the officers' conduct during the initial encounter compelled Mr. Garrison to shoot them. [Petition, Appendix, p. 8a.] Petitioner's own expert conceded that the officers' conduct during the initial encounter was reasonable and appropriate. [Petition, Appendix, p. 40(a).] The fact that the officers remained alert to all possibilities, even the possibility that Mr. Garrison might return with a gun, does not make their actions in identifying themselves and ordering Mr. Garrison back to his house objectively unreasonable. See also *Napier v. Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999) ["The fact that the officers prepared themselves for exactly the behavior that Napier exhibited does not make their actions any less reasonable."]

with Mr. Garrison. While some of the officers who swept through the house did not recall seeing Mr. Garrison moving, Reese and Archibeque, who were involved in the handcuffing, both testified that they observed Mr. Garrison moving.[2]

With respect to Mrs. Garrison, Petitioner states that the Respondents followed Mrs. Garrison around the house and watched her use the toilet. [Petition, p. 7.] Again, Petitioner is attempting to interject false issues – in this instance, that the officers were overly intrusive and callous. Deputy Eldredge encountered Mrs. Garrison on her way to use the bathroom. The bathroom had not yet been cleared for suspects or weapons. Deputy Eldredge told Mrs. Garrison to wait, but she refused. Deputy Eldredge would not let Mrs. Garrison close the bathroom door, and he would not break eye contact with her. While Petitioner characterizes the placing of Mrs. Garrison with the Petitioner as an eviction to ease an investigation, in fact, there was testimony in the record that given the nature of events and Mrs. Garrison's advanced age, officers at the scene determined that the placement of Mrs. Garrison with a relative was in her best interest.

Respondents also take issue with statements in the Petition regarding Mr. Garrison's state of mind when he woke up. [Petition, p. 5.] The Court should not be left

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[2] In any event, as with other issues, the handcuffing is a false issue, as there is no evidence that the handcuffs were roughly applied or that the handcuffing contributed in any way to Mr. Garrison's fatal injuries.

with the impression that Mr. Garrison made any statements regarding his fears or concerns prior to exiting his house the first time.

As previously stated, while Petitioner offers speculative theories as to what the officers might have done differently, there is no dispute as to what actually occurred. Petitioner theorizes that the officers should have taken cover or sent someone to knock on Mr. Garrison's door. Such speculation is nothing more than the 20/20 hindsight and second guessing disfavored in *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1988) ["The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"] and *United States v. Sharpe*, 470 U.S. 675, 686-687, 105 S.Ct. 1568, 1575-1576, 84 L.Ed.2d 605 (1985) [. . . "the court should not indulge in second-guessing. . . . A creative judge in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."] Petitioner's speculations do not create material fact issues. The material facts are not in dispute, and as will be discussed below, by the Petitioner's own admission, summary judgment is appropriate.

REASONS FOR DENYING THE WRIT

Petitioner's own remarks foreclose review. Petitioner concedes:

> . . . whenever a reasonable factfinder could only conclude that an officer's use of force was objectively reasonable, the officer would be entitled to summary judgment, both substantively and on the basis of qualified immunity. . . .
>
> Petitioner does not argue that either defense is eliminated. Rather, Petitioner simply observes that, in excessive force cases, the inquiries for liability and for qualified immunity are the same, *and unless there are no genuine issues of material fact, should be decided by the jury.* (Emphasis added)

[Petition, pp. 15-16.] The district court concluded that, based on the uncontroverted facts, the officers' conduct was objectively reasonable, entitling them to summary judgment both substantively and on the basis of qualified immunity. In so ruling, the court effectively determined that no reasonable juror could find that the officers' actions were unreasonable. The Tenth Circuit affirmed the grant of summary judgment. Petitioner's only real complaint is that the courts decided the issue against the Petitioner. However, the fact that the Petitioner disagrees with the decisions below does not warrant Supreme Court review.

Despite Petitioner's concession that the court could decide the ultimate inquiry if there were no genuine issues of material fact, Petitioner complains "that the jury, rather than the court, should have decided this inquiry." [Petition, p. 14.] Petitioner does not explain why, in light of Petitioner's concession that the court could make the reasonableness determination, that it was improper for the Tenth Circuit to have decided the ultimate inquiry in

this case. Instead, Petitioner contradicts himself and makes the bold assertion that because the qualified immunity inquiry and substantive inquiry "merge" in excessive force cases, "the jury should generally resolve this merged inquiry." [Petition, p. 8.] Petitioner concedes that the "merged inquiry" standard remains that of "objective reasonableness" [Petition, p. 11]; therefore, again, in light of Petitioner's concession that the court could make the objective reasonableness determination in the absence of disputed material facts, it is unclear why the jury must decide the "merged inquiry" in every case.

Petitioner is merely trying to disguise what is nothing more than a disagreement with the lower courts' decisions as an important, unsettled federal question upon which the circuits are in conflict. Moreover, Petitioner is attempting to bootstrap a question upon which there has never been any conflict, whether the ultimate determination can be decided as a matter of law, on to the "merged inquiry" question, upon which there is some division among the circuits.[3] Petitioner intertwines two separate and distinct questions in an attempt to convince the Court that the questions are interdependent such that one cannot be decided without the other. The flaw in Petitioner's logic is readily apparent. Even if the inquiries are the same, as advanced by the Petitioner, it does not follow that the "merged inquiry" must always be decided

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[3] Actually, "merged inquiry" is a misnomer. As will be discussed below, other circuits have considered whether the qualified immunity and substantive inquiries are the same for preclusion purposes; not, as Petitioner suggests, whether the qualified immunity and substantive inquiries "merge" such that qualified immunity no longer exists as a separate defense.

by the jury. Indeed, contrary to Petitioner's assertions, such a proposition effectively eliminates the qualified immunity defense, as, in every case, even when there are no disputed facts and when clearly existing law authorizes the use of a particular force, officers would have to endure the rigors of discovery and a full-blown trial.

The decisions below do not present the "merged inquiry" question, and the Tenth Circuit did not err in refusing to adopt Petitioner's novel proposition that objective reasonableness can never be decided as a matter of law in excessive force cases. The "merged inquiry" is important only when there are disputed facts bearing upon the qualified immunity and substantive defenses, such that the case will be submitted to the factfinder. The division among the circuits involves the effect of an unfavorable merits verdict on the qualified immunity defense. That is the question presented in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *cert. granted*, 525 U.S. 1098 (1999), *cert. dismissed*, 526 U.S. 1083 (1999), *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000) and implicit in *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *cert. granted sum nom. Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 480 (Nov. 13, 2000). These instant cases specifically turn on the question of whether the inquiries "merge," such that a finding on the merits is preclusive.

The case at bar does not. The material facts were not in dispute, and the district court made the determination at the summary judgment stage. The "merged inquiry" is but another false issue interjected by the Petitioner, as a decision by this Court on the "merged inquiry" will have

no impact on this case.[4] Rather, the Court would have to go the next step advanced by the petitioner, – that is, the Court would have to decide that the objective reasonableness inquiry must always be decided by the jury, even when the material facts are not in dispute and when clearly established law authorizes the officers' conduct. Petitioner concedes that the central issue is whether the judge or jury should resolve the inquiry. [Petition, p. 10.]

Petitioner claims that the Circuits are in conflict over the "merged inquiry" question and the question of whether the inquiry can be decided as a matter of law. Again, Petitioner is attempting to intertwine the questions as interdependent. While the Circuit Courts may have considered the implications of the "merged inquiry" in the context of preclusion, Respondents found no case which held that the jury must determine the ultimate inquiry when the material facts are not in dispute. Respondents found no decision which concluded that qualified immunity can never be determined as a matter of law in excessive force cases, and no decision which concluded that summary judgment is never available on the merits in a Fourth Amendment case. Indeed, such a decision would controvert the entire body of summary judgment and qualified immunity law. As will be discussed below, this Court has determined that the reasonableness of an officer's conduct, even in excessive force cases, can and should be determined as a matter of law in the appropriate circumstances. Every Circuit has

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[4] Whether the inquiries are the same or are different, a favorable decision for the defendant at the pre-trial stage on qualified immunity and/or on the merits would be conclusive.

followed suit. Thus, Petitioner's suggestion that trial courts have only "oblique guidance" on this "recurring issue" of who can make the objective reasonableness determination in the absence of disputed facts is completely unfounded. [Petition, p. 14.]

Consequently, the decision sought by the Petitioner that judgment as a matter of law will never be available in excessive force cases does not resolve an unsettled federal question and does not resolve any conflict among the Circuits. Indeed, such a decision will be in conflict with the decisions of every Circuit and in conflict with long settled legal principles regarding summary judgment and qualified immunity. Respondents therefore respectfully urge this Honorable Court to deny the Petition For Writ Of Certiorari.

I. THE PETITION DOES NOT PRESENT AN UNSETTLED FEDERAL QUESTION, AND THERE IS NO CONFLICT AMONG THE CIRCUITS

A. The Decisions Below Are In Accord With The Other Circuits

As with Petitioner's factual allegations, Petitioner's legal argument contains broad-sweeping statements with little support. Citing *Snyder, McNair, Katz,* and *Robinson v. Solano County,* 218 F.3d 1030, *rehearing en banc granted,* 229 F.3d 931 (9th Cir. 2000), Petitioner states that the question of who should determine the ultimate inquiry of whether an officer acted reasonably in an excessive force case is one that has divided the appellate courts. However, the question has never divided the Courts when the material facts were undisputed and warranted a decision prior to

trial. Petitioner's reliance on the instant cases is misguided. The question presented in those cases was whether the qualified immunity inquiry and merits inquiry were different such that the merits inquiry was not necessarily preclusive. The decisions had nothing to do with the question of whether the court could make the final determination prior to trial in the absence of disputed, material facts.

In *Katz*, the court affirmed the denial of summary judgment on qualified immunity grounds because there were "factual disputes between the parties concerning the amount of force used, the nature of the risk posed by Katz, and whether and to what degree Katz resisted arrest." *Id.*, 194 F.3d at 966. The defendant argued that the factual disputes precluding summary judgment on the merits did not necessarily preclude summary judgment on qualified immunity grounds. The court disagreed, equating the merits inquiry with the qualified immunity inquiry. However, the Ninth Circuit did *not* suggest that because the qualified immunity and substantive inquiries were the same, the question could never be decided as a matter of law. Indeed, the Court stated the complete opposite proposition. Although noting that the question of the reasonableness of force is generally a question for the jury, the Court went on to state that "on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to [the plaintiff], the evidence compels the conclusion that [the officer's] use of force was reasonable." *Katz*, 194 F.2d at 970, n.5.

In *Snyder*, the Court was faced with factual disputes as to "what sequence of events occurred, and, in particular, whether Snyder had a gun." *Snyder*, 142 F.3d at 800. The Fifth Circuit therefore concluded that the question of qualified immunity could not be determined prior to trial. Ultimately, the court was faced with the question of whether an unfavorable finding on the merits could be reconciled with a grant of qualified immunity. While the Court in *Snyder* determined that the qualified immunity inquiry and merits inquiry were not identical, nowhere does the *Snyder* Court suggest that either inquiry must be decided by the jury in the absence of disputed facts.

With like effect is the reasoning in *McNair* and *Robinson*. In *Robinson*, there was conflicting testimony as to the circumstances that might have justified the use of force by the officers. The plaintiff maintained that his demeanor was calm; the officers contended that the plaintiff appeared agitated. *Robinson*, 218 F.3d at 1033. The Court concluded that because the "disputed facts go to the very heart of the question of whether the officers' conduct was reasonable," it was inappropriate to decide the case as a matter of law. *Id.*, 218 F.3d at 1037. Again, however, the Court never suggested that the inquiry must always be decided by a jury, even when the facts are not in dispute. In *McNair*, the defendant apparently did not raise the qualified immunity defense until after the jury verdict, which found that the defendant had used excessive force and thus violated the Fourth Amendment. Again, the question was whether the finding of unreasonable conduct on the merits of the claim precluded qualified immunity. The *McNair* Court found that the finding was preclusive; however, in no way did the Court suggest

that any merged inquiry would have to be decided by the jury. In fact, the Court stated the complete opposite conclusion:

> Judges rather than juries resolve immunity defenses, and a judge might conclude before trial – indeed, before discovery . . . – that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force.

McNair, 234 F.3d at 355.

Thus, while the Petitioner is attempting to align himself with the instant cases, those cases do not support the Petitioner's position that the ultimate reasonableness inquiry can never be decided as a matter of law in excessive force cases. In fact, the language in the instant cases supports the opposite conclusion. Nor does the Petition present the issue in those cases on which there may be some division among the Circuits – that is, if there are disputed facts bearing upon the substantive and qualified immunity inquiries, what effect does an unfavorable merits verdict have on the qualified immunity defense? The case at bar was decided on summary judgment, and Petitioner does not, and never has, contended that the qualified immunity and merits inquiries are different so as not to be preclusive. Rather, Petitioner contends that because the inquiries are the same, summary judgment is precluded. None of the Circuits have so held, and there is no conflict on this issue. The Circuits have overwhelmingly recognized that the reasonableness inquiry in excessive force cases, whether in the context of qualified immunity or of the merits, can, and should, be decided on summary judgment in the appropriate circumstances.

Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995); *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994); *Salim v. Pruolx*, 93 F.3d 86 (2nd Cir. 1996); *Taft v. Vines*, 83 F.3d 681 (4th Cir. 1996); *Wagner v. Bay City*, 227 F.3d 316 (5th Cir. 2000); *Mettler v. Whitledge*, 165 F.3d 1197 (8th Cir. 1999); *Montoute v. Carr*, 114 F.3d 181 (11th Cir. 1997); *Napier*.

In the case at bar, the Tenth Circuit followed every other Circuit in deciding that the reasonableness inquiry could be determined as a matter of law.[5] There was no divergence from the Seventh and Ninth Circuits, [Petition, p. 10], and the question of who should determine the inquiry, merged or not, in the absence of disputed facts, is not one on which the Circuits are divided. The position of every Circuit is contrary to that advanced by the Petitioner.

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[5] Petitioner's reliance on *Quezada v. County of Bernalillo*, 944 F.2d 710 (10th Cir. 1991) is again misplaced. The *Quezada* court, when asked on appeal to accept characterizations of the officers' conduct which were not necessarily supported by testimony at the bench trial, stated in dicta that the excessive force inquiry is a factual inquiry best answered by the fact finder. However, the Tenth Circuit has never held that excessive force cases can never be decided as a matter of law, and in line with every other Circuit, has held that summary judgment, even on qualified immunity grounds, is warranted in the appropriate circumstances. *Wilson*; *Thompson v. City of Lawrence, Kan.*, 58 F.3d 1511 (10th Cir. 1995); *Romero v. Board of County Commissioners*, 60 F.3d 702 (10th Cir. 1995).

B. The Decisions Below Are In Accord With Other Tenth Circuit Decisions That Have Addressed The Relevance Of The Officers' Pre-Seizure Conduct

Petitioner suggests that the decisions below ignored the principles set forth in *Allen v. City Of Muskogee*, 119 F.3d 837 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998), *Myers v. Oklahoma County Board of County Commissioners*, 80 F.3d 421 (10th Cir. 1996) and *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995). Petitioner points to the principle that the reasonableness inquiry must include consideration of whether an officer's own reckless conduct generated the need to use deadly force against a citizen. [Petition, pp. 14-15.] The decisions below specifically considered the exact principle invoked by the Petitioner. [Petition, Appendix, pp. 7a-8a, 40a.] Both the district court and the Tenth Circuit concluded that there was no evidence of any conduct on the part of the officers "to escalate the encounter with Mr. Garrison into a deadly confrontation." [Petition, Appendix, p. 40a.]

The fact that the Courts below decided the issue as a matter of law does not conflict with Petitioner's instant cases. Once again, there were genuine issues of fact which precluded summary judgment in *Allen*, *Myers*, and *Sevier*. In *Allen*, the Court noted:

> Defendants acknowledged before the district court that there are differences among the eyewitness depositions. For example, some deposition testimony indicates that Lt. Smith ran 'screaming' up to Mr. Allen's car and immediately began shouting at Mr. Allen . . . other testimony indicates that Lt. Smith approached

> cautiously, and tried talking Mr. Allen into giving up the gun." *Id.*, 119 F.3d at 841.

In *Myers* and *Sevier*, the Tenth Circuit declined review of the denial of summary judgment on qualified immunity grounds because the district courts' denials were based on the presence of disputed material facts. Again, in the case at bar, there are no such disputes.

C. The Question Presented By The Petition Is Settled By This Court

Petitioner argues that a determination of the reasonableness of conduct is always fact-intensive and thus better left to the jury. [Petition, p. 11.] Thus, under Petitioner's view, Fourth Amendment cases could never be decided as a matter of law, and the qualified immunity defense would effectively be lost. This proposition was specifically rejected in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As the Court pointed out:

> . . . the Creightons argue that it is inappropriate to give officials alleged to have violated the Fourth Amendment – and thus necessarily to have *unreasonably* searched or seized – the protection of a qualified immunity intended only to protect reasonable official action. . . . [W]e find the argument unpersuasive. (Emphasis included)
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> . . . .
>
> We have frequently observed, and our many cases on point amply demonstrate, the difficulty of determining whether particular searches or

> seizures comport with the Fourth Amendment. . . . Law enforcement officers whose judgments in making these difficult determinations are *objectively legally reasonable* should no more be held personally liable in damages than should officials making analogous determinations in other areas of law. (Emphasis added)

Anderson, 483 U.S. at 643-644, 107 S.Ct. at 3041. Petitioner's attempt to distinguish *Anderson* fails. Petitioner's assertion that the standard of reasonableness set forth in *Anderson* is in "marked distinction" to the standard in excessive force cases is, once again, completely unfounded. [Petition, p. 16.] Petitioner concedes that the standard in excessive force cases, whether for qualified immunity or the merits, is "objective reasonableness." [Petition, p. 16.] Moreover, the *Anderson* Court specifically acknowledged that the objective reasonableness inquiry for qualified immunity can, and should, be determined as a matter of law, when the material facts are not in dispute. The Court stated:

> One of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government'. . . . For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of litigation. . . . Thus, on remand it should first be determined whether the actions the Creightons allege [officer] to have taken are actions that a reasonable officer could have believed lawful. If

> they are, then [officer] is entitled to dismissal prior to discovery. . . . [6]

Anderson, 483 U.S. at 646 n.6, 107 S.Ct. at 3042. According to the Court, then, if the actions of the officers were undisputed and objectively reasonable in light of clearly existing law, dismissal was warranted. Thus, the *Anderson* Court refused to carve out an exception to qualified immunity law for Fourth Amendment search cases, even after noting the "fact-specific" nature of the inquiry. *Id.*, 483 U.S. at 641, 107 S.Ct. at 3040. Moreover, contrary to Petitioner's argument, the Court did not imply that excessive force claims should be distinguished.

Nor was that the position of the Court in *Graham*. In *Graham*, the Court vacated the grant of a directed verdict on the merits of an excessive force case and remanded for the district court to reconsider the issues under a newly adopted standard. The *Graham* Court determined that excessive force cases should be analyzed under the reasonableness standard of the Fourth Amendment rather than the Fourteenth Amendment standard which imposed a subjective element. Noting that the officer's beliefs may nevertheless be relevant to the qualified immunity defense, the Court stated, "Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment." *Graham*, 490 U.S. at 399, n.12, 109 S.Ct. at 1873. Petitioner seizes upon this last statement as an indication that this

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[6] It should be noted that in the case at bar, summary judgment was granted only after extensive discovery had occurred.

Court has not decided whether the qualified immunity inquiry and substantive inquiry are the same in excessive force cases. [Petition, p. 9, n.2.] Once again, however, that question is not the central question presented in the Petition. The central question advanced by the Petitioner is whether the ultimate inquiry can be decided as a matter of law. In *Graham*, the case was remanded for the court to reconsider the directed verdict; the *Graham* court did not remotely suggest that a directed verdict was improper or that the jury must decide the reasonableness inquiry.

Thus, the question of whether the inquiry can be decided as a matter of law is not unsettled by this Court. This Court has held that the reasonableness of an officer's conduct can, and should, be determined as a matter of law in the appropriate circumstances. The case at bar, where there are no material factual disputes and the officers' conduct was objectively reasonable and authorized by clearly existing law, presents exactly those circumstances.

D. Petitioner Presents No Viable Argument For Precluding Judgment As A Matter Of Law In Excessive Force Cases

Again, Petitioner's own remarks contradict the proposition that summary judgment should not be available in excessive force cases. Petitioner concedes that "whenever a reasonable factfinder could only conclude that an officer's use of force was objectively reasonable, the officer would be entitled to summary judgment." [Petition, p.

15.] Petitioner offers no viable argument for his contradictory proposition that objective reasonableness must be decided by a jury; rather, once again, Petitioner makes broad-sweeping statements regarding "quintessential double standards" with little support. [Petition, p. 12.] Petitioner maintains that qualified immunity can be characterized either as a question of law or a question of fact. While the jury's resolution of factual disputes can be determinative of the qualified immunity inquiry, qualified immunity is, nevertheless, a legal question. *Mitchell v. Forsyth*, 472 U.S. 511, 526-529, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); see also *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988) [qualified immunity presents a question of law; "the court cannot avoid the question by framing it as a factual issue."] And again, it is the factually disputed scenario with the potential effect of an unfavorable merits verdict on the qualified immunity defense that properly presents the "merged inquiry" question. That is not the scenario in this case.

Similarly unsupported is Petitioner's view that "practically, textually, and historically, the jury and not the judge should determine whether an officer's use of force is objectively unreasonable within the meaning of the Fourth Amendment." [Petition, p. 13.] To the contrary, Petitioner's proposition is antithetical to the entire body of qualified immunity and summary judgment law. Petitioner's reliance on Judge Easterbrook's comments in *McNair* is misplaced. In *McNair*, the Court was faced with a defendant who apparently raised the qualified immunity defense after the jury had found that the defendant had used excessive force in violation of the Fourth Amendment. In no way did the *McNair* Court suggest

that the objective reasonableness inquiry must be decided by a jury, and indeed, as pointed out above, stated the complete opposite conclusion ["Judges rather than juries resolve immunity defenses, and a judge might conclude before trial . . . that the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force."] *McNair*, 234 F.3d at 355.

The Petitioner offers no viable argument as to why the ultimate reasonableness inquiry, whether in the context of qualified immunity or of the merits, can never be determined as a matter of law in excessive force cases. Petitioner simply asserts that this Court should adopt that proposition, a proposition which controverts the entire body of summary judgment and qualified immunity law.

II. THE TENTH CIRCUIT WAS CORRECT IN DECIDING THE STATE LAW CLAIMS AGAINST THE PETITIONER

As in every other area, Petitioner's argument with respect to the state law claims contains false issues and broad-sweeping allegations with no support. Petitioner contends that the Tenth Circuit breached its "duty to review . . . in its apparent rush to reject Petitioner's appeal at all costs." [Petition, p. 20.] The Tenth Circuit held oral arguments on the case, and within its discretion, ordered Respondents to provide a response brief to Petitioner's Petition For Rehearing And Suggestion Of

Rehearing *En Banc*.[7] There was hardly any "rush to reject the Petitioner's appeal at all costs." Again, Petitioner's only real complaint is that the courts below ruled against the petitioner.

The Tenth Circuit did not "egregiously" refuse to review the district court's dismissal of the state law claims. Rather, the Tenth Circuit was disinclined to disturb the trial court's conclusions with respect to New Mexico law. [Petition, Appendix, p. 9(a).] The district court devoted ample discussion to its analysis of the state law claims. [Petition, Appendix, pp. 50(a)-58(a).] Under such circumstances, *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) authorizes appellate acceptance without the need for expanded explanation. The *Russell* Court stated, "If the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." *Id.*, 499 U.S. at 232, 111 S.Ct. at 1222. Petitioner offers no explanation as to why the district court analysis was inadequate in the case at bar. Instead, Petitioner simply makes the bare, unsupported allegation that the district court's analysis was not exhaustive. [Petition, p. 20.] Again, the opinion belies this assertion. Thus, even if the Tenth Circuit inartfully phrased its acceptance of the district court's conclusions, those conclusions were well-reasoned and exhaustive of the state law inquiry. Review by this Court is unwarranted.

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[7] The Tenth Circuit follows Fed.R.App. 40 which states in Subsection (a)(3): "Unless the court requests, no Answer to a petition for panel rehearing is permitted."

CONCLUSION

Petitioner is advancing a position that has never been accepted by this Court nor by any Circuit. Petitioner wants this Court to decide that the objective reasonableness of an officer's conduct can never be decided at the summary judgment level in excessive force cases, even when the material facts are not in dispute and even when clearly existing law authorized the particular use of force. Such a proposition effectively eliminates the qualified immunity defense, which is designed to protect officials from the legal process well in advance of trial. The material facts are not in dispute in this case. Although this Court has admonished that the reasonableness of a particular use of force should not involve second guessing the officer's conduct with the benefit of 20/20 hindsight, that is exactly what the Petitioner believes that a jury must be allowed to do in this case, and indeed, in every case. Petitioner offers no sound argument for his position, and there is none. The case was properly decided by the courts below, and this Court should deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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